Q. How long have you lived there?

A. Since 1950.

Q. In 1950 did you acquire from your mother title to some property on Old Shepherdsville Road?

A. Yes.

Q. Real property?

A. Yes.

Q. Is this the deed to the property (indicating)?

A. Yes, sir.

Mr. Lusky: For the record, I will say this is a deed from Lizzie Oberan who is your mother, to Sam Thompson, deed No. 2450, recorded in Deed Book 2605 Page 466, in the Jefferson County Clerk's Office.

A. Yes.

Q. This real property consists of what?

A. Three lots.

Q. Where are those lots with reference to the property you live in?

A. On the righthand side of old Shepherdsville Road.

Q. And you live in the house adjacent to these lots?

A. Right next door.

Q. Who owns the house?

A. Well, I am the up-keeper of the house.

Q. By that you mean that you keep up the house for the owner and they let you live there rent free?

A. Yes.

Q. You are the sole owner of these lots?

A. Yes.

Mr. Lusky: Your Honor, I have the tax bills on them.

The Court: That's not necessary.

Q. Did you go from your home to Louisville on January 14th—what time?

A. It was about ten minutes after one o'clock—it

takes the bus at least thirty minutes to come in town—the Buechel bus.

Q. What was the purpose of your coming in town?

A. I brought in some old junk to sell to a junk dealer.

Q. Where did you get the junk from?

A. From my home.

Q. You brought some junk in and sold it to a junk dealer?

A. Yes.

Q. Where is that junk dealer located?

A. Preston and Liberty.

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Q. Where did you get off the bus?

A. Preston and Jefferson.

Q. What did you do then?

A. I went to the junk store.

Q. Did you sell the junk?

A. Yes, it only brought about ninety cents—just a lot of old junk.

Q. How much money did you have when you came in?

A. Well, I had some change—I had a dollar—the fare from Buechel is twenty cents—you don't get a ticket.

Q. When you got off the bus how much money did you have?

A. I went over—I don't recall, I got ninety cents for the junk and I came back to Jefferson Street and went into the fish market and bought a roll of oysters and I had a fish sandwich and a cup of coffee—

Q. How much did you pay for that?

A. Forty-six cents, and then I went down the street—I came down Jefferson Street to another place, I believe they call it Happy's Cafe—I had been there previously and owed the man in there a quarter and I stopped in to pay the quarter I owed him and bought a bottle of soft

drink—

Q. Did you have any money left?

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A. I had seventy or seventy-one cents left.

Q. And where did you go from there?

A. I went down to Sixth and Jefferson—walked down to Walnut—well, I walked around a while, mostly waiting for the time for the bus to go out.

Q. Does that bus run on a schedule?

A. Yes.

Q. It runs about how often—

A. It has about the same schedule.

Q. It runs on a schedule?

A. Yes.

Q. Did you have a schedule in your pocket at the time the officer arrested you?

A. Yes.

Q. Well, you came back down Jefferson to the bus station which is between Liberty and Jefferson on Second?

A. Yes.

Q. About what time was that?

A. I will say between a quarter past three and a quarter to four.

Q. It was between a quarter past three and a quarter to four?

A. Yes.

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Q. Was there a bus to Fern Creek or Buechel that you could catch at that station before 4:40?

A. I believe the Buechel bus leaves a few minutes before the Fern Creek bus and you can catch the bus at the Union Bus Station.

Q. When you got to the bus station, what did you do?

A. I got a drink of water at the fountain and went out

on Jefferson Street—I stopped to get a drink of water and Miss Ford was sitting on the bench facing Jefferson Street and I went over there and sat down and talked to her and was talking to her when the officers walked in.

Q. How long had you known this Miss Ford?

A. Since I had been out there.

Q. She is a neighbor of yours?

A. Yes.

Q. State whether or not you had ridden the bus together?

A. Oh, yes, her sister does more than she does.

Q. Was she a friend of your mother's?

A. Yes.

Q. Now, you say you sat in the waiting room and talked to Mrs. Ford?

A. Yes.

Q. Which way were you facing?

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A. I was facing Jefferson Street when the officers came in—one came in the side door and the other officer came in the front of the Jefferson Street side.

Q. What happened then?

A. Immediately when he walked in he looked at me and told me to get up and he pointed at different ones—this fellow and that fellow (indicating) and I asked him who he was talking to and he said "I am talking to you, get up" and I said "for what?" and he said "Get up" and I said "What are you locking me up for, I am going to catch the Fern Creek bus and he stood me against the wall and then picked up the other guys—

Q. Did you talk to the other men?

A. Not inside.

Q. Did you talk to them outside?

A. No. I have seen some of them from time to time

in the station.

Q. Were you talking to anybody other than Miss Ford at the time the officers walked in?

A. No.

Q. Did Officer Suter ask you how much money you had?

A. No, he didn't ask me that.

Q. Did he search you?

A. He just patted me around like that (indicating).

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Q. Did he put his hand in your pocket?

A. No.

Q. Did he ask you if you had bus fare?

A. No.

Q. Did you have bus fare?

A. Certainly.

Q. You have been riding those busses for how long?

A. Ever since I have been out there, since 1950.

Q. Did the dispatcher at the bus station make any objection to your being there?

A. No, he didn't because—

Q. Was Mr. Robinson sitting on the same bench with you when the officer came in?

A. No.

Q. Do you know where he was?

A. He was sitting on the other side of the bench.

Q. You had not said anything to him?

A. No, sir, I was talking to Miss Ford.

Q. Had you drunk any wine that day?

A. No.

Q. Had you had anything else besides water?

A. No—well, I had this Seven-Up—Cream Soda.

Q. Officer Suter said he smelled wine on you,

is that true, or not?

A. No, it is not.

Cross-examination by Mr. Dougherty

Q. You say you didn't talk to these men inside: Did you talk to them outside? What did you say to them outside?

Mr. Lusky: Object; he said he didn't talk to them outside.

The Court: Let him ask him.

Mr. Lusky: That's a misleading question.

Mr. Dougherty: You are supposed to mislead on cross-examination.

A. Well, this fellow here (indicating) asked me for a match.

Q. You have seen him there many times?

A. I have seen him there.

Q. And you have been in that bus station many times?

A. Quite often.

Q. You know that a lot of perverts hang around that bus station?

Mr. Lusky: Object.

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The Court: If he knows he can answer.

Q. You know that, don't you?

A. It is none of my business what they do.

Q. But you know they hang around there?

A. Well, I guess they hang around everywhere.

Q. That's the reason these police visit that place to catch these winos who make dates?

Mr. Lusky: Object.

Q. You have been arrested there before for loitering?

A. I certainly have.

Mr. Lusky: Object to previous arrests.

The Court: I will have to overrule the objection.

Mr. Lusky: Exception.

Q. How many times have you been arrested for loitering?

Mr. Lusky: Object.

Q. About how many times?

A. Well, I don't know, like I said, I have been riding the bus—

The Court: He asked how many times you have been arrested on a similar charge.

A. Well, Mr. Suter always arrests me when I go

there to catch the bus to go to Buechel—

Q. (Interrupting) You have been convicted on that too, have you not?

A. Not lately.

Q. How often—

Mr. Lusky: May it please the Court, can I have a continuous objection to this line of questioning?

The Court: Yes, we will note your objection.

Q. When they brought you down the station house they searched you, didn't they?

A. Yes.

Q. And took your property, didn't they?

A. Yes.

Q. What property did they take off of you?

A. Well, everything—took my billfold and I had a bus schedule—

Q. Were you given a receipt for that?

A. Yes.

Q. Where is the receipt they gave you for your money and your property?

A. Well, they took it downstairs—they sent it down

to the property room.

Q. When they took it to the property room, they

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gave you a receipt, did they?

A. Yes.

Q. Where is that receipt?

A. Down in the property room.

Q. You turned it in when you got your property?

A. Yes, I had to.

Q. Did you get any of it back?

A. Yes.

Q. How much money did you get back?

A. Well, at one time I got $5—

Q. And that $5 would show on your property receipt—that was—

A. (Interrupting) That was another time.

Q. I am talking about this time.

A. Well, I only had some change this time and they don't take the change at all.

Q. Didn't they check in your property at this time?

A. Well, they took my fingernail clip and my keys to the house and the bus schedule and my billfold.

Q. Did they give you a receipt for that?

A. Yes.

Q. Where is that?

A. I turned that back in in order to get my stuff back.

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Q. But it didn't show you had any money on that receipt?

A. Well, I just had some change and they let you keep your change.

Q. How much was that?

A. I think seventy cents.

Q. What time was your bus due?

A. Between 3:30—about a quarter to four.

Q. And this was what time when the officer picked you up?

A. 3:30.

Q. You had no bus ticket?

A. You don't buy a bus ticket.

Q. You know that the bus dispatcher didn't want you in there—

Mr. Lusky: Object: I know better than that because I talked to the dispatcher. I talked to the dispatcher and he said he didn't call the officers.

Q. Didn't the dispatcher complain about these winos being in there?

Mr. Lusky: Object, and move that that be stricken.

Q. Now, you say you just work one day a week?

A. I work for Dr. Dean one day a week—

Q. You were only working one day a week at the time this occurred?

A. Yes.

Q. And the rest of the time you hung around this bus station?

Mr. Lusky: Object.

A. No.

Q. Is your mother still living?

A. No.

Redirect Examination by Mr. Lusky

Q. Had you suffered an injury to your left arm on Saturday the 10th of January?

A. Yes.

Q. Was that such that it required seven stitches at the time?

A. Yes.

Q. Were you able to work after that—

The Court: He said he worked a full day.

Q. Did Officer Suter to your knowledge—I don't know what his answer will be—did he have any knowledge of this injury to your arm?

A. I am quite sure he did.

Q. Will you tell the Court how he knew about this previous injury?

A. Well, another officer knew—

The Court: Just what this officer knew.

A. Well, on the way down to the police station they were having a picnic.

Q. Had you seen Officer Suter the previous Saturday?

A. Yes.

Q. Will you state the circumstances under which you had seen him?

Mr. Dougherty: Object.

Q. How did he know that your arm was injured?

A. The other officer made the remark—

The Court: How did you injure your arm?

Q. Was it cut with a knife?

A. Yes.

The Court: In a cutting scrape?

Mr. Lusky Object.

The Court: Had you been in a cutting scrape the Saturday night before that?

A. Yes.

Mr. Lusky: I would like to offer, since

I want the record to be straight and I will prove it unless it can be stipulated that on January 10th Mr. Thompson was stabbed in the arm on Jefferson Street by a stranger, unknown to him, that Mr. Thompson followed this stranger

down the street and hailed a squad car and asked the officer to arrest this man, but instead of arresting the man, Mr. Thompson was arrested and charged with disorderly conduct.

Mr. Dougherty: I certainly would not stipulate that.

Q. Did you do anything to bring this stabbing about?

Mr. Dougherty: Object.

A. No.

Q. Officer Suter, did you talk to this man on the 10th?

Mr. Suter: I was not working on the 10th or the 11th.

ALMA FORD, called for the defendant, being first duly sworn, was examined by Mr. Lusky, and testified as follows:

Q. What is your name?

A. Alma Ford.

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Q. Where do you live?

A. 1728 Lucas.

Q. What do you do?

A. I do domestic work.

Q. How long have you known Mr. Thompson?

A. Ever since he has been in Buechel.

Q. About a matter of some years?

A. About eight or nine years.

Q. Did you see him on the afternoon of January 14th?

A. Yes, sir.

Q. What time?

A. Between 3:30 and a quarter to 4:00.

Q. Where did you see him?

A. He was in the Union Bus Station at 231 Jefferson.

Q. State whether or not he sat down next to you and talked to you?

A. Yes. After he took drink of water he went over—he sat down facing the Jefferson Street side and was sitting

there talking to me when the officers came in— one came in from the left side— the right side door, and the other one came in the front way and they asked the different men what they were doing in there and they had different excuses as to what they were waiting for and what-not, and so Mr. Thompson was sitting there talking to me

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and then the Officer turned around to Mr. Thompson and said "Hey, you" and Mr. Thompson said "You mean me"? and the officer said "Yes", so Mr. Thompson walked over to him—he walked over to him and he began searching and then he took him out to the police car that was waiting outside and then took him on down.

Q. Your testimony is he was talking to you at the time Officer Suter came in the bus station?

A. Yes.

Q. Could you possibly be mistaken about that?

A. No, sir.

Q. Was Mr. Robinson sitting near him?

A. No.

Q. Was he talking to Mr. Robinson?

A. No; Mr. Robinson was standing up against the radiator like he was getting his hands warm.

Q. Did Mr. Thompson have any wine or any liquor on his breath?

A. No.

Q. How long had you been talking to Mr. Thompson before Officer Suter came in?

A. About four or five minutes.

Q. Did you hear him tell Officer Suter he was waiting there for a bus?

A. Yes, sir; he said he was waiting for the

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Fern Creek bus.

Q. You have ridden that bus with him before?

A. Yes, he leaves on the 3:45, or the other one at 4:30.

Cross-examination by Mr. Dougherty

Q. How long have you known him?

A. Eight or nine years.

Q. You know these other fellows?

A. No.

Q. You say you ride the bus all the time?

A. Yes.

Q. About how many times a week?

A. I ride the bus five days a week.

Q. You have never seen these fellows in the bus station before?

A. Yes, I have seen them in the bus station.

Q. Did you ever see Thompson drinking wine in there at times?

A. No.

Q. Now, you want to do everything you can to help Mr. Thompson?

A. Sir?

Q. You want to do everything you can to help him?

A. Yes, and I want to tell the truth.

Q. Where do you work?

A. Well, on Tuesdays I work for the Doolans and Wednesday I work for Mrs. Hardin and—

Q. Is that Mrs. W. L. Doolan?

A. Yes, and I work for Mrs. Bland and Mrs. Kennedy and Mrs. Ziegland, and—

OWEN ROBINSON, called for the defendant, being first duly sworn, was examined by Mr. Lusky, and testified as follows:

Testimony of Owen Robinson

Q. What is your name?

A. Owen Robinson.

Q. You are one of the defendants in a case here today?

A. Yes.

Q. And you were arrested in the Union Bus Terminal on the afternoon of January 14th about a quarter to four in the afternoon?

A. Yes.

Q. On that day did you see Mr. Thompson?

A. I saw him there.

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Q. Did you talk to him?

A. No.

Q. Did you talk to him that day?

A. No.

Q. Had he said a word at all to you?

A. No.

Cross-examination by Mr. Dougherty

Q. Did you talk to him on the outside that day?

A. No.

Q. You are the one that had the pint of wine?

A. Yes.

Q. And did Thompson drink out of that pint of wine?

Mr. Lusky: Object.

A. No, I was the only one.

Q. Where did you get the wine?

A. I got it across the street from the bus terminal.

Q. How long have you known Mr. Thompson?

A. I don't know him now.

Q. Where do you work?

A. 211 South Third for John W. Conniffe.

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Q. Every day?

A. Yes.

Q. What are your hours of work?

A. Well, I might start at five o'clock in the morning and work until 6:30.

Q. What kind of work do you do?

A. Porter work.

Q. Why do you hang around that bus station?

A. I don't hang around there.

Q. But you were drinking on this occasion—you were drunk?

A. I wasn't drunk.

Q. You weren't drunk?

A. No.

Q. But you had a pint of wine?

A. Yes, I did.

Q. Did you smell any liquor on Mr. Thompson's breath?

A. Well, I couldn't tell that because you know when you are drinking you can't smell it on anybody else.

Q. Then your answer is you didn't smell it on his breath because you had been drinking?

A. That's right.

The Defendant Here Rested.

The Court: Do you want an appealable

fine, otherwise, I will give you the minimum fine of $10, unless you want an appealable fine.

Mr. Lusky: If there is going to be a fine I would like for it to be an appealable fine, but first, I would like to file a brief after I get this transcript.

Mr. Dougherty: I object to that, because we have thousands of cases here and every time this gentleman comes in with a case he wants to make a federal case out of it and this is nothing but a two-bit case.

The Court: The officer has testified he has arrested this man before on similar charges and I am basing my decision on that.

Mr. Lusky: I would like to have a chance to be heard on this matter. This man was there to catch a bus and the officer testified he told him he was there to catch a bus and he had bus fare in his pocket—

The Court: He had no money.

Mr. Lusky: But he didn't search the man and he has been riding the bus with this woman that testified for years.

The Court: The officer testified he didn't have any money.

Mr. Lusky: It has to be agreed that he told the police officer that he was there to catch a bus.

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Mr. Dougherty: Was he going to wait til midnight to catch a bus?

Mr. Lusky: He was only there about five minutes and that's not contradicted.

Mr. Dougherty: This man has a long record of arrests and has been charged with perversion.

Mr. Lusky: I am not running him for public office; I am just defending him here on these charges and claim he is not guilty of this crime.

The Court: If you want to appeal it, I will make it $20 on the loitering and file the vagrancy away.

Mr. Lusky: We would like to have the vagrancy dismissed.

Mr. Dougherty: Your Honor, he is just doing that to try to intimidate the officer.

Mr. Lusky: Nothing of the sort, the testimony is that he had means of support.

The Court: I have a right in the vagrancy case to

either give him a $10 fine or thirty days in jail, or both and if you want an appealable fine I will give you the thirty days—I will either give him $10 on the vagrancy or thirty days.

Mr. Lusky: What happens if he doesn't pay the $10?

The Court: He has to work it out.

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Mr. Lusky: The $10 fine is not appealable?

The Court: No. Change the $10 fine on vagrancy to thirty days for the purpose of appeal and I will make it $20 on the loitering charge because counsel asked me to make it large enough to appeal.

Mr. Lusky: For the record I want to make a motion for a new trial, which I assume Your Honor will overrule, but I want to make a motion for a new trial on the ground that the statute and the ordinance as applied here deprive the defendant of his liberty and property without due process of law, in violation of the 14th Amendment to the United States Constitution.

The Court: Let the record show that the motion is overruled and also let the record show that on the loitering charge the court proposed to give a $10 fine but counsel desires an appealable fine so I will make the fine $20 on the loitering, and the vagrancy charge, the Court proposed to file away that charge but counsel for defendant insists upon a dismissal and I was going to make a $10 fine on the vagrancy charge but counsel desires an appealable fine so I will make the fine thirty days in jail on the vagrancy charge.

State of Kentucky
County of Jefferson } ss.

I, James G. Warren, Official Stenographer, Police Court of Louisville, Kentucky, do hereby certify that the foregoing is a full, true and correct transcript of the said testimony given in the above styled action.

Witness my hand this 28th day of January, 1959.

(s) James G. Warren,
Official Stenographer, Police Court
Louisville, Kentucky.

EXHIBIT "C".

BUECHEL BUS CO.
LOUISVILLE - APPLIANCE PARK SCHEDULE
Daily except Sunday and Holiday

INBOUND		XS							XS					
READ DOWN	AM	AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM
APPLIANCE PARK GATE #5	—	—	707	—	—	—	—	—	G	—	335	—	—	—
APPLIANCE PARK GATE #2	@525	@613	*	800	855	1016	1136	103	200	225	340	425	530	730
BASHFORD MANOR & NEWBURG	538	626	721	811	906	1027	1147							
BARDSTOWN & DOUGLASS	550	638	733	823	918	1039	1159	119	216	241	356	441	546	746
LOUISVILLE ARR. (LTC)	609	657	752	842	937	1058	1218	138	235	300	415	500	605	805

OUTBOUND		XS							XS					
READ DOWN	AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM
LOUISVILLE LV. (LTC)	610	710	805	845	940	1100	1220	140	235	315	430	515	615	815
BARDSTOWN & DOUGLASS	629	729	824	904	959	1119	1239	159	254	334	449	534	634	834
BASHFORD MANOR & NEWBURG							1252	212	307	347	502	547	647	847
APPLIANCE PARK GATE #2	645	745	840	920	1015	1135	102	222	*	357	512	557	657	857
APPLIANCE PARK GATE #5	650			G					320			G		

SUNDAY & HOLIDAY TO LOUISVILLE
Via Bardstown Road

INBOUND			OUTBOUND		
Lv. Newburg & Shep. Rd.	Bashford Manor & Newburg Rd.	Arr. Lou. (LTC)	Lv Lou. (LTC)	Bashford Manor & Newburg Rd.	Arr. Newburg & Shep. Rd.
AM	AM	AM	AM	AM	AM
900	910	937	945		1015
1030	1040	1107	1115		1145
PM		PM	PM	PM	PM
300		330	330	357	407
430		500	500	527	537
600		630	630	657	707
730		800	800	827	837

* - Via Shepherdsville Road and Poplar Level Road.

@ - From Bardstown and Shepherdsville to Newburg and Shepherdsville, then north.

G - To or from Garage.

XS - Does not run on Saturdays.

Effective January 11, 1959.

EXHIBIT "D".

EXHIBIT "D".

BLUE MOTOR COACH LINES

FERN CREEK – LOUISVILLE

SCHEDULE EFFECTIVE SEPTEMBER 16, 1957

STATIONS **FERN CREEK: EAT SHOPPE**
LOUISVILLE: 213 W. LIBERTY STREET

SCHEDULE FOR WEEK DAYS Phone JU 4-5336

OUTBOUND					INBOUND				
Leave Louisville	Leave Gardiner Lane	Leave Buechel	Leave Rest Haven	Arrive Fern Creek	Leave Fern Creek	Leave Rest Haven	Leave Buechel	Leave Gardiner Lane	Arrive Louisville
A.M.					A.M.				
5.00	5.25	5.30	5.33	5.40	5.40	5.47	5.50	5.55	6.20
5.30	5.55	6.00	6.03	6.10	6.10	6.17	6.20	6.25	6.50
6.00	6.25	6.30	6.33	6.40	6.40	6.47	6.50	6.55	7.20
6.25	6.50	6.55	6.58	7.05	7.10	7.17	7.20	7.25	7.50
6.55	7.20	7.25	7.28	7.35	7.40	7.47	7.50	7.55	8.20
7.25	7.50	7.55	7.58	8.05	8.10	8.17	8.20	8.25	8.50
7.55	8.20	8.25	8.28	8.35	8.40	8.47	8.50	8.55	9.20
8.30	8.55	9.00	9.03	9.10	9.15	9.22	9.25	9.30	9.55
9.20	9.45	9.50	9.53	10.00	10.00	10.07	10.10	10.15	10.40
10.00	10.25	10.30	10.33	10.40	10.45	10.52	10.55	11.00	11.25
10.45	11.10	11.15	11.18	11.25	11.30	11.37	11.40	11.45	12.10
11.30	11.55	12.00	12.03	12.10	P.M.				
P.M.					12.30	12.37	12.40	12.45	1.10
12.30	12.55	1.00	1.03	1.10	1.30	1.37	1.40	1.45	2.10
1.30	1.55	2.00	2.03	2.10	2.15	2.22	2.25	2.30	2.55
2.15	2.40	2.45	2.48	2.55	3.00	3.07	3.10	3.15	3.40
3.00	3.25	3.30	3.33	3.40	3.45	3.52	3.55	4.00	4.25
3.45	4.10	4.15	4.18	4.25	4.30	4.37	4.40	4.45	5.10
4.15	4.40	4.45	4.48	4.55	5.00	5.07	5.10	5.15	5.40
4.45	5.10	5.15	5.18	5.25	5.30	5.37	5.40	5.45	6.10
5.15	5.40	5.45	5.48	5.55	6.00	6.07	6.10	6.15	6.40
5.45	6.10	6.15	6.18	6.25	6.30	6.37	6.40	6.45	7.10
6.15	6.40	6.45	6.48	6.55	7.00	7.07	7.10	7.15	7.40
7.30	7.55	8.00	8.03	8.10	8.30	8.37	8.40	8.45	9.10
9.15	9.40	9.45	9.48	9.55	10.00	10.07	10.10	10.15	10.40
10.45	11.10	11.15	11.18	11.25	11.30	11.37	11.40	11.45	12.10

Schedule for Sunday and Holidays on reverse side

EXHIBIT "E".

POLICE COURT OF LOUISVILLE
No. B9174

Commonwealth of Kentucky and
City of Louisville, - - - - - - Plaintiffs,
v.
Sam Thompson, - - - - - - - - - Defendant.

AVOWAL OF SAM THOMPSON.

The witness Sam Thompson, if permitted to answer, would testify, and the same is true, that on January 10, 1959, he was arrested without a warrant by officer F. Fletcher of the Louisville Police Force and without legal cause was charged with the crime of disorderly conduct; that on January 11, 1959, he retained counsel and on January 12, 1959, when arraigned in Louisville Police Court demanded a trial, whereupon the case was assigned for trial January 27, 1959; that on January 12, 1959, he obtained his liberty on bond pending trial; that on January 14, 1959, the said police office F. Fletcher and officer J. S. Suter arrested him without a warrant and without legal cause charged him with the crimes of loitering and vagrancy; that after his said arrest and while conveying him to Police Headquarters one of the said police officers said, "I ought to whip your ass", and pulled his hat roughly down over his face, giving him to understand that he had been thus re-arrested because he had retained counsel, pleaded not guilty and demanded a trial on the previous disorderly conduct charge, which would put officer Fletcher to the trouble of appearing in court to testify on January 27, 1959; that on January 14, 1959, he retained counsel, pleaded not guilty to said charges of vagrancy and loitering and demanded a trial, whereupon the case was assigned

for trial January 20, 1959; that a trial on said charges was held in Louisville Police Court on that date, at which no evidence was introduced to support the charges, as evidenced by the transcript of evidence authenticated by the certificate of James G. Warren, official stenographer of said Police Court, a counterpart original copy of which transcript is attached hereto and tendered in evidence herewith; that the Judge of said Court nevertheless found him guilty of loitering but stated his intention to file away the vagrancy charge, whereupon defense counsel objected to such action, as a result of which the said Judge found him guilty of vagrancy also; that he thereupon immediately perfected an appeal from said judgment of conviction to Jefferson Circuit Court and made a supersedeas bond, thus obtaining his liberty pending determination of the appeal, which has not yet been decided; and that on January 27, 1959, the original charge of disorderly conduct came on for trial in Louisville Police Court and was filed away.

Further, that he is a person of limited income, earning approximately $12 to $20 a week; that although said income is sufficient for his minimum personal needs, he has little or no surplus funds; that he has incurred attorney fees totaling $50 for representation in the two cases aforesaid, has spent $24 for the fees on his two aforesaid bail bonds and $27 for the fee on his said supersedeas bond fee on appeal; that in the present case he has incurred a further attorney fee in the amount of $25 and another bail bond fee in the amount of $12; that he will probably be financially unable to defend himself against further groundless arrests and prosecutions; and that if he is forced to abandon such defense because of the expense involved, he will have been denied all redress against the aforesaid unjustified and malicious prosecutions even though said prosecutions were wholly without legal cause.

(s) Louis Lusky,
Attorney for Defendant.

EXHIBIT "F".

POLICE COURT OF LOUISVILLE
No. B9174

Commonwealth of Kentucky and
City of Louisville, - - - - - - Plaintiffs,

v.

Sam Thompson, - - - - - - - Defendant.

MOTION TO DISMISS AT CLOSE OF WHOLE CASE.

Comes now the defendant by counsel at the close of the whole case and renews his motion to dismiss previously made at the close of the prosecution's case, on the same Federal constitutional and other grounds as were stated in said earlier motion.

(s) Louis Lusky,
Attorney for Defendant.

EXHIBIT "G".

POLICE COURT OF LOUISVILLE
No. B9174

Commonwealth of Kentucky and
City of Louisville, - - - - - - Plaintiffs,

v.

Sam Thompson, - - - - - - - Defendant.

APPLICATION FOR STAY AND FOR BAIL.

Comes now the defendant by counsel and respectfully states to the Court that he desires to seek review of the judgment of conviction herein in the Supreme Court of the United States, in order to obtain adjudication of his constitutional rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; that he will, in the near future, apply for review in the Supreme Court on certiorari or appeal; that, however, his application for appeal or certiorari will not be acted upon by that Court, in the ordinary course, for a month or more; and that if he is committed to jail during that period his sentence herein will have been served and satisfied before the Supreme Court can act on his application for review and the case will thereby become moot; and that, in order to preserve his right to the determination of his rights under the United States Constitution, it is constitutionally necessary that execution of the sentence herein be stayed for a time sufficient to enable him to seek review of the case in the Supreme Court and, if said Court takes jurisdiction of the case, for a further period pending final disposition of the case by that Court.

Exhibit "G"—Application for Stay, Etc.

Wherefore, the defendant moves that execution of the sentence herein be stayed until final disposition of the case by the United States Supreme Court, and that defendant be allowed his freedom during the period of said stay upon execution of a proper supersedeas or bail bond, with good sureties, it being understood that if the defendant shall fail to make application to the Supreme Court of the United States for review of the case within the period permitted by law, the stay herein shall be automatically terminated and the defendant shall forthwith surrender himself for execution of the sentence.

(s) Louis Lusky,
Attorney for Defendant.

EXHIBIT "H".

POLICE COURT OF LOUISVILLE
No. B9174

Commonwealth of Kentucky and
City of Louisville, - - - - - - - Plaintiffs,

v.

Sam Thompson, - - - - - - - - - Defendant.

MOTION FOR NEW TRIAL.

The defendant by counsel moves for a new trial on the same Federal constitution and other grounds as were stated in his motion to dismiss at the close of the prosecution's case and his further motion to dismiss at the close of the whole case, and prays an opportunity to argue the motion on the basis of the transcript of evidence after said transcript has been prepared by the Official Stenographer of this Court.

(s) Louis Lusky,
Attorney for Defendant.

POLICE COURT OF LOUISVILLE
No. B9174-A

Commonwealth of Kentucky and
City of Louisville, - - - - - - Plaintiffs,

v.

Sam Thompson, - - - - - - - Defendant.

JUDGMENT—LOITERING.

The above-styled case having come on for trial without a jury before the Honorable Hugo Taustine on February 3, 1959, and the defendant having appeared personally and by counsel, and evidence having been received and argument heard, and the Court being sufficiently advised, it is

Ordered and Adjudged that the defendant is found guilty of loitering as charged, under Section 85-12 of the Ordinances of the City of Louisville; and pursuant to Section 85-13 of said Ordinances he is fined $10 and is ordered to pay the costs of this action; and

Whereas the foregoing judgment is not appealable or otherwise reviewable by any Kentucky Court, but the defendant by counsel has declared his intention to seek review thereof in the Supreme Court of the United States, and to that end has applied for a stay of execution and bail pending disposition of the case by said Supreme Court, and whereas the Court being advised is of the opinion that it is legally powerless to suspend execution or allow bail for more than 24 hours, it is further

Ordered that execution of the foregoing judgment and sentence be and it hereby is suspended for 24 hours, to-wit, until 12:00 o'clock Noon on February 4, 1959, at which time the defendant shall surrender himself to Kenneth

Wildt, Bailiff of this Court, for execution of the sentence; and it is further Ordered that the defendant may remain at liberty upon his appearance bond heretofore executed until that time.

(s) Hugo Taustine, Judge,
Police Court of Louisville.
Enter: February 3, 1959.

A true copy:
Attest—H. C. Akin,
Clerk, Police Court of
Louisville.

JUDGMENT—DISORDERLY CONDUCT.

The above-styled case having come on for trial without a jury before the Honorable Hugo Taustine on February 3, 1959, and the defendant having appeared personally and by counsel, and evidence having been received and argument heard, and the Court being sufficiently advised, it is

Ordered and Adjudged that the defendant is found guilty of disorderly conduct as charged, under Section 85-8 of the Ordinances of the City of Louisville; and pursuant thereto, he is fined $10 and is ordered to pay the costs of this action; and

Whereas the foregoing judgment is not appealable or otherwise reviewable by any Kentucky Court, but the defendant by counsel has declared his intention to seek review thereof in the Supreme Court of the United States, and to that end has applied for a stay of execution and bail pending disposition of the case by said Supreme Court, and whereas the Court being advised is of the opinion that it is legally powerless to suspend execution or allow bail for more than 24 hours, it is further

Ordered that execution of the foregoing judgment and sentence be and it hereby is suspended for 24 hours, to-wit, until 12:00 o'clock Noon on February 4, 1959, at which time the defendant shall surrender himself of Kenneth Wildt, Bailiff of this Court, for execution of the sentence; and it is further Ordered that the defendant may remain at liberty upon his appearance bond heretofore executed until that time.

(s) Hugo Taustine, Judge,
Police Court of Louisville.
Enter: February 3, 1959.

A true copy:
Attest—H. C. Akin,
Clerk, Police Court of
Louisville.

JEFFERSON CIRCUIT COURT
Common Pleas Branch, Fifth Division
No. 40175

Sam Thompson, - - - - - - - - Petitioner,

v.

Hugo Taustine, Judge, Police Court of Louisville; Solon F. Russell, the Sheriff of Jefferson County; and Kenneth Wildt, the Bailiff of the Police Court of Louisville, - - Respondents.

ORDER.

This matter having been regularly brought on for hearing on the petition for writ of Habeas Corpus by Sam Thompson, and Kenneth A. Wildt, Bailiff of the Police Court of Louisville, having produced the petitioner in obedience to said writ and having filed his response showing that he is holding the petitioner in custody under two commitments duly issued by the Clerk of the Police Court on two judgments entered in the Police Court in cases No.'s B9174A and B9174B wherein Sam Thompson was the defendant, and it appearing from the pleadings herein and from the provisions of the Kentucky Revised Statutes that the petitioner can not appeal the judgments of the Police Court mentioned above or otherwise obtain review of said judgments in any court of the Commonwealth of Kentucky and that said petitioner desires to apply to the Supreme Court of the United States for a writ of certiorari on the ground that his constitutional rights under the Federal Constitution have been violated by the judgments above set out, and it further appearing to the Court that it will take more than ten days for application for the writ of

certiorari to be made to the Supreme Court, and that unless the carrying into execution of the two judgments of the Police Court is stayed while said application is being made to the Supreme Court, the constitutional questions raised by the petitioner will become moot, it is, therefore,

Ordered, Considered And Adjudged by this Court that the petition for writ of habeas corpus herein be granted and that the petitioner, Sam Thompson, execute bond in the penal sum of $35.00 with approved surety, or by depositing with the Clerk of this Court $35.00 in United States currency, the bond to be conditioned upon his surrendering himself forthwith to the Bailiff of the Police Court of Louisville to be dealt with and proceeded against according to law in the event the two above-mentioned judgments of the Police Court of Louisville shall be affirmed, or his petition for a writ of certiorari be for any cause dismissed or denied by the Supreme Court of the United States, or if such petition be not filed on or before May 4, 1959, or if said writ is granted and the judgment of the Police Court of the City of Louisville is reversed and a new trial ordered.

It Is Further Ordered by the Court that the Police Court of Louisville and the Bailiff thereof shall suspend all actions and proceedings to enforce said two aforementioned judgments, in accordance with the terms of this order, and that an attested copy of this order be sent to the Clerk of the Police Court of Louisville with directions to include said attested copy in such transcript of record as shall be prepared in the two above-mentioned cases.

(s) Lawrence S. Grauman,
Judge.

Attested Copy: John M. Hennessy,
Circuit Clerk.

By: [illegible], D. C.

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 884, October Term, 1958

SAM THOMPSON, Petitioner,

vs.

CITY OF LOUISVILLE et al.

ORDER ALLOWING CERTIORARI—June 22, 1959

The petition herein for a writ of certiorari to the Police Court of Louisville of the Commonwealth of Kentucky is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR A WRIT OF
CERTIORARI TO THE POLICE
COURT OF THE CITY OF
LOUISVILLE

FILE COPY

MAY 1 1959
JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 91

SAM THOMPSON, Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

LOUIS LUSKY,
MARVIN H. MORSE,
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Louisville 2, Kentucky,
Attorneys for Petitioner.

HAROLD LEVENTHAL,
EUGENE GRESSMAN,
Of Counsel.

WESTERFIELD-DONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. _____.

SAM THOMPSON, - - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE, and
COMMONWEALTH OF KENTUCKY, - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

May it please the Court:

Petitioner prays that a writ of certiorari issue to review two judgments of the Police Court of the City of Louisville, Kentucky (herein called the "Police Court"), which judgments were rendered in the above-entitled case on February 3, 1959, and were entered February 4, 1959.

CITATIONS TO OPINIONS BELOW.

The Police Court rendered no opinion. The judgment of Jefferson Circuit Court in a *habeas corpus* proceeding brought for the purpose of obtaining stay and bail pending review by this Court was rendered

February 4, 1959 (R. 78).* Its opinion, which is unreported, is printed in Appendix B hereto, *infra,* p. 29. The majority and dissenting opinions of the Kentucky Court of Appeals on appeal in the *habeas corpus* proceeding are respectively printed in Appendix B hereto, *infra,* pp. 35, 40. They are not yet reported. The majority opinion was rendered March 13, 1959; the dissenting opinion was rendered April 10, 1959.

JURISDICTION.

The judgments of the Police Court were entered on February 4, 1959 (R. 75-77), petitioner's motion for new trial having been overruled February 3, 1959 (R. 74). The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), since the judgments of the Police Court have infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

Under Kentucky law no civil action for malicious prosecution or wrongful arrest can be maintained unless and until the original criminal case terminates in favor of the accused. On the other hand, no Police Court conviction is reviewable on the merits in any State court, by any mode of review (with one exception not applicable in this case) if the sentence is a fine of

*The transcript of evidence and other pertinent portions of the record are printed in Appendix C hereto, and the record references contained herein are references to pages in that Appendix.

less than $20. The petitioner has been subjected to two successive arrests on petty misdemeanor charges for the sole reason that the Louisville police have resented his action in retaining counsel and demanding a hearing on a previous disorderly conduct charge; and in these two successive cases the Police Court Judge (no jury trial being allowed in such cases under Kentucky law) has found the defendant guilty despite the total absence of any evidence of guilt. In the second of these cases the Police Court has imposed two $10 fines, which are too small to be reviewable in any state court. The Federal questions are:

1. Whether such convictions, being unsupported by any evidence of guilt, constitute wholly arbitrary official action and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether the failure of Kentucky to provide corrective judicial process whereby Federal constitutional objections to such convictions can be adjudicated, violates the due process clause of the Fourteenth Amendment.

3. Whether such convictions deny petitioner all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. Whether, in view of the fact that the said arrests were made in reprisal for petitioner's insistence on his Federally protected rights to retain counsel and demand a trial on the earlier misdemeanor charge, the foreclosure of effective redress against such arrests

infringes said right to counsel and right to a judicial hearing, and thereby violates the due process clause of the Fourteenth Amendment.

STATUTES INVOLVED.

Petitioner was convicted of loitering under §§85-12 and 85-13 of the Ordinances of the City of Louisville, printed in Appendix A, *infra*, pp. 27-28, and was convicted of disorderly conduct under §85-8 of said Ordinances, printed in Appendix A, *infra*, p. 27.

STATEMENT.

Although the case now before the Court was initiated by an arrest made January 24, 1959, full understanding of the issues requires reference to two earlier misdemeanor cases which involved arrests made January 10 and 14.* The facts of these earlier cases, in so far as they are pertinent, appear in the present record.

On January 10, petitioner was arrested without a warrant by officer F. Fletcher of the Louisville Police Force and was charged with disorderly conduct. He retained counsel and on January 12 appeared in Police Court and demanded a trial, whereupon the case was assigned for trial January 27 and he was released on bond pending trial (R. 69).†

*All dates given herein are in 1959.

†On January 27th this charge was filed away (R. 70).

At about 3:45 P.M. on January 14, two days after being thus released, petitioner was sitting in the colored waiting room of the Union Bus Station in Louisville, waiting for a bus to Buechel, Kentucky, a suburb of Louisville, where he lived. Officer Fletcher and officer Suter, another Louisville policeman, entered the waiting room and arrested him without a warrant, charging him with the crimes of vagrancy and loitering. After his arrest, while conveying him to Police Headquarters, one of said policemen subjected petitioner to verbal abuse and some slight physical abuse, giving him to understand that he had been thus re-arrested because he had retained counsel, pleaded not guilty and demanded a trial on the previous disorderly conduct charge, which would put officer Fletcher to the trouble of appearing in court to testify in that case (R. 69-70).

Petitioner again retained counsel, pleaded not guilty and demanded a trial, whereupon this case was assigned for trial January 20 (R. 69-70). At that trial the sole witness for the prosecution was officer Suter. He testified that he had "charged Thompson with vagrancy and loitering because he didn't give me any proof as to working anywhere". (R. 37). He also said petitioner had been sitting with a man named Robinson who had a bottle of wine and that petitioner had wine on his breath (R. 36-37).

The prosecution, as a part of its case in chief, attempted to introduce proof that petitioner had a previous felony record, but this proof was excluded when it was discovered that the felony record belonged to

another man of the same name (R. 37-39). The prosecution was however allowed to show, over objection, that petitioner had been previously arrested more than once (R. 40).

Officer Suter said he had found no money on petitioner (R. 37) but never testified that he had searched petitioner or asked him whether he had bus fare. Later, in response to a leading question by the Court, he said that petitioner "had no money" and that he "didn't see any" bus ticket (R. 44). He admitted that he did not know whether a Buechel bus was about to leave (R. 44) and that petitioner had told him he was in the station to catch a bus (R. 43).

A motion to dismiss having been overruled, petitioner adduced the following proof:

(a) His own testimony that he owned real property in West Buechel; that he was employed; that he had been in the bus station only a few minutes before his arrest; that he had had a bus schedule in his pocket; that no bus tickets were required; that he had not spoken to Mr. Robinson or taken any of his wine; that he did nothing in the bus station except get a drink of water and talk to Miss Alma Ford, a neighbor and frequent fellow-passenger; that officer Suter had not searched his pockets or asked him if he had bus fare; and that he did not have bus fare. (He recounted his movements and activities prior to his arrest in circumstantial detail, and showed where he had gotten the bus fare (R. 47-58).)

(b) The testimony of Dr. Wynant Dean, a physician, that petitioner had done housework for him and

his father for the past thirty years and was so employed at the time of his arrest (R. 45-47).

(c) The testimony of Miss Ford, who fully corroborated petitioner's testimony as to what had happened in the bus station; testified that he had been there only four or five minutes before officer Suter came in, and that an appropriate bus was scheduled to leave at 3:45 P.M.; and testified that petitioner had not spoken to Mr. Robinson and had no wine or liquor on his breath (R. 58-60).

(d) The testimony of Mr. Robinson, who testified that he and petitioner had had no conversation and that he had given petitioner none of his wine (R. 61-62).

The Court found petitioner guilty of loitering, saying (R. 63):

> "The officer has testified he has arrested this man before on similar charges and I am basing my decision on that" (R. 63).

The Court rejected a request by petitioner's counsel to reserve decision until the testimony could be transcribed and a brief filed (R. 62). The Court proposed to fine petitioner $10 on the loitering charge; but, fines under $20 not being appealable, the Court stated its willingness to impose a $20 fine on that charge. An appealable $20 fine was thereupon requested and imposed.

On the vagrancy, the Court proposed to file the charge away, which would have had the effect of preventing a malicious prosecution action against the arresting officers, because of the lack of a final adjudication of the criminal case. *Van Arsdale* v. *Caswell*, Ky., 311 S. W. 2d 404 (1958). Petitioner having objected to this and requested a dismissal, the Court (without further testimony or argument) found petitioner guilty of vagrancy and, though willing to impose a $10 fine, acceded to petitioner's request for an appealable judgment and sentenced petitioner to 30 days in jail (R. 62-64). An appeal was perfected forthwith and petitioner was released on bond.*

At 6:53 P.M. on January 24, four days after this trial, petitioner was again arrested without warrant while waiting for a bus to his home. This time he had taken the precaution of not waiting in the bus station.† Instead, he had waited in a small tavern, the Liberty End Cafe, a few blocks east of the station and about half a block from where the bus stops (R. 19, 22). He was charged with loitering and disorderly conduct, the case being tried February 3.

The testimony on this trial (undisputed except as noted) was as follows: About 6:20 P.M. on January 24 petitioner entered the Liberty End Cafe. He bought and consumed a dish of macaroni and a glass of beer, these being served to him by a waiter or waitress other

*On the appeal the case was tried *de novo* before a jury in Jefferson Circuit Court on March 18th. A verdict of acquittal was returned on peremptory instruction by the Court.

†"Mr. Suter always arrests me when I go there [to the bus station] to catch the bus to go to Buechel" (R. 54).

than William Marks, the manager. The next bus he could catch was scheduled to leave the station at 7:30. At 6:53 he was standing between the bar and some booths which were located along the opposite wall, talking to the people in one of the booths and patting his foot or doing a shuffle dance to the music of the juke-box. Petitioner's conduct was in no way objectionable or disorderly, and Mr. Marks (who was in charge of the place) did not object to his presence there (R. 10).

At 6:53 P.M. officers Lacefield and Barnett entered the cafe and saw petitioner. They asked Mr. Marks how long petitioner had been there and Mr. Marks said a little over half an hour. Officer Barnett asked Mr. Marks if petitioner had bought anything and Mr. Marks (according to his own testimony (R. 25-26)) said *he* had not sold petitioner anything. Officer Lacefield quoted Mr. Marks as saying that petitioner "had not bought anything" (R. 2). Officer Barnett said to Mr. Marks that petitioner "had been in something down at the bus station" (R. 26).

Officer Lacefield then went to petitioner and asked why he was there. Petitioner said he was waiting for a bus. The policeman, professing to believe that the bus to petitioner's home did not run anywhere near the Cafe and that petitioner had not bought anything in the Cafe (both of which beliefs were shown by the uncontradicted evidence to be contrary to fact) arrested him for loitering. Officer Lacefield testified that the

arrest was also based partly on the fact that petitioner was "dancing" (R. 2, 8).*

Petitioner had a bus schedule and bus fare in his pocket but was not asked about this, or about his employment. No one else was arrested (R. 9) and, so far as appears, none of the other occupants of the Cafe were interrogated.

After his arrest for loitering, petitioner argued with the officers. Solely for this reason (although his argument was respectful and not belligerent) he was charged with disorderly conduct as well (R. 2-3, 24-25).

After receipt of the foregoing evidence, plus the same evidence of petitioner's employment and real estate ownership as in the January 20 trial, defense counsel filed a motion to dismiss on Federal Constitutional grounds (R. 30, 71) and requested an opportunity to argue the motion on the basis of the transcript (R. 31). The motion was overruled (R. 30). Petitioner was then found guilty of both charges. He was fined $10 on each charge, the Court not offering this time to impose appealable sentences (R. 31).

---

*On its own motion, the Court asked Officer Lacefield whether the Cafe had a "license for dancing" (R. 9). The prosecution then introduced evidence that the Cafe had no "dance permit" (R. 11). The efforts of petitioner's counsel to ascertain the nature of the dance license requirement, and to find out whether it would be an offense to dance in a place not licensed for dancing, were unavailing (R. 19). An offer to prove that the lack of a dance license would not render petitioner's solo activities unlawful was rejected (R. 37).

HOW FEDERAL QUESTIONS WERE RAISED.

The Federal questions here presented were specifically raised at the February 3 trial by a written motion to dismiss at the close of the prosecution's case (R. 13-14, 33-34), and again by a written motion to dismiss at the close of the whole case (R. 30, 71), and still again by a written motion for new trial (R. 32, 74). Each of said motions was overruled without opinion or other explanation. Petitioner's Federal claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

UNAVAILABILITY OF STATE COURT REVIEW.

Since it is somewhat unusual to seek review in this Court of the judgment of a city police court, it is appropriate to show that no review of the merits of the Federal claims is available in any Kentucky court and that the Police Court is therefore the highest court of the State in which a decision can be had. This will clearly appear from a brief review of the proceedings subsequent to February 3.

Police Court fines of less than $20 not only are not appealable to any Kentucky court, but are not reviewable on writ of prohibition where, as here, the ordinances on which the prosecution is based are not attacked. KRS §26.080. In such cases there is no statutory provision for stay and bail pending review by a higher court. It was however necessary for petitioner to obtain a stay and bail pending application for

review in this Court because, had he remained in jail for 10 days, he would have automatically served out his fines—at the rate of $2.00 a day—and the case would have become moot long before this Court could have ruled on it. KRS §26.450 and City of Louisville Ordinances §3-13.

Petitioner therefore applied to the Police Court for stay and bail (R. 31, 72-73). A stay was granted for 24 hours but that Court, lacking statutory authority, refused a further stay and on February 4 entered the two judgments complained of (R. 75-77). That same day petitioner applied for and obtained in Jefferson Circuit Court a common law writ of *habeas corpus* granting him his liberty on $35 cash bail, pending review here. The opinion of Circuit Judge Lawrence Grauman (Appendix B, *infra*, pp. 29-30, 32) said in part:

> "Petitioner, Sam Thompson, * * * claims that the convictions deprive him of his liberty and property without due process of law, in violation of the 14th Amendment to the United States Constitution.
>
> "An examination of the record (including the two Police Court transcripts and the two judgments of conviction referred to above, which have been made available to this court and are now ordered filed as a part of the record) shows that these Federal Constitutional claims are substantial and not frivolous.
>
> "Petitioner has no remedy in the Kentucky courts. The $10 fines are too small to be appealable. Review by way of the statutory writ of prohibition

(KRS 26.080) is not available, since petitioner is not here questioning the legality of the loitering and disorderly conduct ordinances on which the convictions were based. The convictions can not be tested by *habeas corpus,* since the Police Court's jurisdiction over the person and the subject matter is not questioned. Petitioner's only recourse is, therefore, to seek review on certiorari in the United States Supreme Court, for which he may petition within 90 days after the February 3, 1959, judgments.

* * * * * * *

"The petitioner Thompson, through counsel, vigorously insists that there is no evidence upon which conviction and sentence by the Police Court could be based (there appears to be merit in this contention) * * *."

The respondents appealed this decision to the Kentucky Court of Appeals (the highest court of the State). That Court agreed that stay and bail should be granted, declaring (Appendix B, *infra,* pp. 30-31, 32):

"The opinion of Hon. Lawrence Grauman, Judge of the Jefferson Circuit Court, which granted the writ of habeas corpus, recites that an examination of the records of the police court, including the transcripts of evidence of the two trials, 'shows that these federal constitutional claims are substantial and not frivolous.' The majority of this court agree with this statement of Judge Grauman.

* * * * * *

"Appellee appears to have a real question as to whether he has been denied due process under

> the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari."

The Court of Appeals held that Circuit Court lacked the power to grant stay and bail but that "in extreme cases like the one at bar" the Court of Appeals would itself grant relief, acting under the general supervisory power granted to it by §110 of the Kentucky Constitution.* The Police Court was therefore ordered to grant stay and bail on substantially the same terms as had been prescribed in Circuit Court.

The highest court of Kentucky has thus held that petitioner has no way of reviewing the merits of the case in any State court, despite the fact that serious Federal due process questions have been raised. But on the other hand it has rendered its considered judgment that petitioner's Federal claims are so substantial as to justify the grant of highly extraordinary interim relief to enable him to press them in this Court. Though it considers itself powerless, under Kentucky law, to set aside the convictions, the Court has done what it could—within the limitations of the Kentucky precedents—to clear the way for review here.

*"The Court of Appeals * * * shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

REASONS FOR GRANTING THE WRIT.

As a preliminary matter we state a perfectly obvious proposition: Neither petitioner's February 3d conviction, which is directly involved here, nor his January 20th conviction, was based on any evidence whatever. We do not offer this proposition as an independent reason for granting the writ. For present purposes it is not necessary to claim that this Court must review *every* case in which a state court of last resort enters a judgment without supporting evidence. We simply assert the proposition as a premise for the discussion below.

Even under the broad and vaguely worded legislative prohibitions against loitering, disorderly conduct and vagrancy, there was not the shadow of evidence that could have justified the convictions. It was not loitering for petitioner to sit in the bus station for five minutes just before his bus to his home was due to leave, there being no objection by the person in control of the premises,* whether or not petitioner had wine on his breath and whether or not he was talking to a man with a bottle of wine in his pocket. It was not vagrancy for petitioner to earn only $12 a week,† and

*There is of course an implied invitation to the general public to enter places of public accommodation such as bus stations and cafes. 52 Am. Jur., tit. "Trespass", § 39.

†Petitioner proved that he could live on $12 a week, since he had no rent to pay and his other expenses were modest. The Police Court Judge took "judicial notice" of the "fact" that $12 would not suffice to pay for the beer and whiskey which he said petitioner bought (R. 18). Except for this remarkable excursion, petitioner's testimony on this point stands uncontradicted.

to carry with him no evidence of his employment. In this country personal identification papers have never been required of civilians, even in wartime. It was not loitering for petitioner to wait for his bus in the Liberty End Cafe for half an hour or so (there being no objection by the person in control of the premises) whether or not petitioner ate or drank anything, and whether or not he patted his foot to the music of the juke box. It was not disorderly conduct for petitioner to argue with the police, in a respectful manner, about his illegal arrest.

The lack of evidence to support the convictions will be clear from a review of the relatively short record (Appendix C hereto). It has been recognized both by Judge Lawrence Grauman of Jefferson Circuit Court and by Judge Porter Sims, writing for a majority of the Kentucky Court of Appeals (see Appendix B, *infra*, pp. 32 and 36). Considering this preliminary proposition to be established, we now state the reasons for granting the writ.

Conflict With Applicable Decisions of This Court.

Petitioner's situation is that he cannot walk the streets of Louisville, or even innocently wait for a bus to his home, without being arrested on sight. Though he resists charges placed against him and proves beyond any doubt that they are unwarranted, he is nevertheless found guilty. As soon as he takes an appeal from one conviction he is rearrested, again without cause; and, after the form of a trial, he is again con-

victed—this time with a sentence too small for appeal. The conviction immunizes the arresting officers from civil liability, for under Kentucky law the unappealable judgments of conviction, unless set aside, will stand as a complete bar to petitioner's only effective remedy and deterrent—an action for malicious prosecution. *Van Arsdale* v. *Caswell, supra,* and cases cited at 311 S. W. 2d 406. As a result petitioner is subjected to the unrestrained and arbitrary will of the Louisville police.

Thus the Police Court decision is not simply a ruling that petitioner must pay $20 in fines to the City of Louisville. It is a virtual sentence of outlawry.

In *Wolf* v. *Colorado,* 338 U. S. 25, 27-28 (1949) this Court declared:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

To the same effect, see the opinion of Jackson, J., in *Irvine* v. *California*, 347 U. S. 128, 132 (1954). These cases involved unlawful searches. They apply *a fortiori* to an unlawful arrest.

And in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369-370 (1886) this Court held:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.
>
> "* * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The power of the police to effect summary arrests is not questioned. But due process requires that some effective procedure be provided for redress against abuse of that fearsome power. This Court has upon occasion upheld summary official action, taken without prior notice and opportunity for hearing; but in each such case the validity of the action was upheld solely because judicial review on the merits was available at some later time. See *Lawton* v. *Steele*, 152 U. S. 133, 142 (1894); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315-320 (1908), quoting with approval the opinion of Holmes, J. in *Miller* v. *Horton*,

152 Mass. 540, 26 N. E. 100 (1891). And when such review on the merits is not available, due process is held to have been denied. *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, 197 (1933).

Nor can it be said that the Police Court trial itself satisfies this due process requirement. The convictions, being devoid of evidence to support them, are a nullity. Even in an alien deportation case, and even on collateral attack, this Court has held (*U. S. ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 106 (1927):

> "Deportation * * * on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus.*"

The fact that the Police Court Judge is a judicial rather than an administrative officer is immaterial. Where, as here, the record shows that a court has acted wholly arbitrarily and irrationally, its action is open to review on constitutional grounds. As was said in *Mooney* v. *Holohan,* 294 U. S. 112, 113 (1935):

> "[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial * * *."

See also *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (due process held denied where "the whole proceeding is a mask").

The three judges who dissented in the Kentucky Court of Appeals premised their position on the assumption that this Court is powerless to review the evidence, even for the purpose of showing that the

decision below was wholly arbitrary. The contrary has long since been established. As was said in *Fiske* v. *Kansas*, 274 U. S. 380, 385-386 (1927):

> "And this Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Additional authorities are cited in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (2d Ed., 1951), §108.

The denial of due process by the Police Court is aggravated by Kentucky's failure to provide corrective judicial process. Such failure has itself been declared by this Court to be a denial of due process. *Mooney* v. *Holohan, supra,* at 294 U. S. 113. In that case the Court declined to entertain an original petition for *habeas corpus* because the petitioner had not shown that he was without remedy in the California courts. In this case, however, the showing has been made.

It is quite clear that in Kentucky no corrective judicial process is available. No appeal is possible. *Merson* v. *Muir,* Ky., 284 S. W. 2d 811, 812 (1955). Review by statutory writ of prohibition under KRS §26.080(2) is not available because appellee does not here question the validity of the loitering and disorderly conduct ordinances. Review by common law writ of prohibition is likewise unavailable, even though

a Federal due process claim has been made. *Walters* v. *Fowler*, Ky., 280 S. W. 2d 523 (1955). Review by *habeas corpus* is unavailable because petitioner does not question the Police Court's jurisdiction to try the case. *Anderson* v. *Buchanan*, 292 Ky. 810, 168 S. W. 2d 48, 52 (1943); *Owen* v. *Commonwealth*, Ky., 280 S. W. 2d 524, 525 (1955), and cases there cited. Review by the Police Court itself by common law writ of error *coram nobis* would of course be fruitless where as here the grounds of review have already been presented to that court on motion for new trial and have been rejected by it.

The foregoing discussion makes it clear, we think, that the Police Court's decision is in conflict with applicable decisions of this Court, without consideration of the Police Court Judge's reasons for convicting the petitioner. But in fact the record contains clear indications that the January 20th and February 3d convictions were motivated by a desire to protect the arresting officers from civil actions. The prosecutor complained more than once that defense counsel was trying to "intimidate" the officers (R. 9, 63). At the January 20th trial the Judge, after hearing all the evidence, was ready to "file away" the vagrancy charge rather than to find the petitioner guilty (which would have been his clear duty if the evidence warranted a conviction). The defendant, exercising his right under *Van Arsdale* v. *Caswell, supra,* objected to such action, which would have avoided a final disposition of the vagrancy charge and would thus have foreclosed a malicious prosecution action. Thereupon the Judge,

instead of dismissing the charge, found the defendant guilty. And it is significant that at the February 3d trial the Judge did not offer the petitioner an appealable sentence (as he had done at the January 20th trial) but imposed fines too small for appeal—which, as has been noted, has the effect of foreclosing all possibility of a civil action against the arresting officer unless this Court reverses. It is hard to understand this action, except in terms of the court's desire to debar the petitioner from his civil remedy. The decision of the Police Court therefore conflicts in principle with *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

The conviction of the petitioner without evidence of guilt, at least when coupled with the lack of corrective judicial process in Kentucky and the indications that the Police Court Judge was motivated by a desire to deny the petitioner his civil remedy against illegal and arbitrary arrest, is amply sufficient to justify review by this Court. But there is a further circumstance which renders the denial of constitutional right even more flagrant. The present convictions were the culmination of a series of reprisals taken upon the petitioner by the Louisville police because of his temerity in claiming his Federally protected rights to retain counsel and demand a trial after his January 10th arrest.

An unbroken thread connects the January 10 arrest with all the subsequent proceedings. On January 12 petitioner appeared with counsel, demanded trial and was released on bond (R. 69). On January 14 he was

arrested in the bus station and was told that his January 12 action was the reason for his arrest (R. 69). After appealing his January 20 conviction he was rearrested in the Liberty End Cafe January 24 by an officer who, according to the testimony of the cafe manager (a disinterested witness) stated that the petitioner "had been in something at the bus station" (R. 26).

That the Fourteenth Amendment due process clause guarantees the right to counsel and the right to a hearing is too well settled for argument. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930). The existence of a Federal right necessarily implies a Federally protected immunity against harassment, reprisal or punishment for exercise of that right. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Johnson* v. *Maryland*, 254 U. S. 51 (1920), and cases there cited; *N. A. A. C. P.* v. *Alabama, ex rel. Patterson*, 357 U. S. 449 (1958).

Importance of the Federal Questions.

Much more is involved here than the injustice done to this petitioner. The real question is whether anyone in Kentucky—and, indeed, in any state which imposes the same restrictions on criminal appeals and tolerates the same denial of corrective judicial process for redress of constitutional violations—can incur the personal displeasure of the police without subjecting himself to a course of harassment for which there is no remedy.

This very record discloses the nature of the police practices which have grown up under the umbrella of the existing legal situation. Both officer Suter, who arrested petitioner on January 14, and officer Lacefield, who arrested him on January 24, testified that the arrests were made in the course of a "routine check" or "fair check" of places of public accommodation (R. 2, 36). What this really means, as the testimony of Alma Ford shows in some detail (R. 59) is that the police enter such places as restaurants and bus stations and, without search warrants or arrest warrants, require whomever they please to account for their presence, show proof of employment, and otherwise explain their circumstances. If the explanation is unsatisfactory to the arresting officer an arrest is made and petty charges filed.

Such police methods are alien to our institutions. They constitute a standing threat to the freedom and privacy of all.

The gravity of the situation would be plain enough if the case involved only a dispassionate effort on the part of the police to prevent persons whom they considered undesirable from frequenting public places. But this case involves an even broader incursion upon the common right. This petitioner has been twice arrested and prosecuted not because of any diffuse attitude of official disapproval but for the specific reason that he retained counsel and demanded trial on a previous unfounded charge. To deny him all possibility of redress against such reprisal is to eviscerate the rights which lie at the very core of due process.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

GENERAL ORDINANCES OF THE CITY OF LOUISVILLE, KENTUCKY.

§85-8 Disorderly Conduct, Penalty. (a) Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), or imprisoned not exceeding fifty (50) days, or both so fined and imprisoned.

(b) In addition to imposing a fine, the Police Court may hold the offender to bail in a sum not exceeding one thousand dollars ($1,000.00) to keep the peace, or be of good behavior for any length of time not exceeding one year.

(c) Should the offender fail to give bond or fail to pay the fine, he shall be forthwith committed to the city workhouse, and shall be kept in custody until bail be given, or until the time fixed by the judgment shall have expired and the fine be paid or satisfied by labor as provided by law.

§85-12 Loitering, Prohibited. It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville; or for such person or persons to sleep, lie, loaf; or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; or for such person or persons to sleep or lie in or upon any public thoroughfare, highway, park, boulevard, or wharf of the City of Louisville; or for such person or persons to beg or solicit alms in the streets or the highways of the City of

Louisville; or for such person or persons to habitually consort with bawds, thieves, malefactors, or other disreputable or dangerous characters in the City of Louisville.

§85-13 Penalty. Any person violating this ordinance shall be guilty of the offense of loitering, and shall be liable to arrest therefor; and for each offense shall be punished by a fine of not exceeding fifty ($50.00) dollars, or he shall be compelled to give bond in the sum of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, conditioned upon his or her good behavior, and keeping the peace for not exceeding one year; and in default of such bond, if the same be required, the defendant shall be imprisoned in the workhouse, and there confined during the period said bond was to cover, or until the same shall be executed as required; or the defendant may be both so fined and required to execute a bond to be of good behavior as aforesaid, in the discretion of the court.

APPENDIX B.

OPINIONS OF JEFFERSON CIRCUIT COURT AND KENTUCKY COURT OF APPEALS.

JEFFERSON CIRCUIT COURT
Common Pleas Branch, Fifth Division
No. 40175.

Sam Thompson, - - - - - - - - Petitioner,

v.

Hugo Taustine, Judge, Police Court, Louisville, Kentucky,
Solon F. Russell, Sheriff of Jefferson County, and
Kenneth Wildt, Bailiff of Police Court, Louisville, Kentucky, - - - - - - - - Respondents.

OPINION OF GRAUMAN, J.

Petitioner, Sam Thompson, has been convicted in the Louisville Police Court of two crimes, loitering and disorderly conduct. He claims that the convictions are without any foundation in the evidence (which has been transcribed by the official stenographer of the Police Court and which has been read by this court); that, however, unless reversed they will foreclose him from recovery of damages for two arrests which he claims were arbitrary and without legal cause; that the two arrests were reprisals against him for exercising his legal right to retain counsel and demand a judicial hearing on an earlier criminal charge that has since been filed away; and that, in the absence of

any evidence to support the convictions, it must be concluded that the convictions resulted from the desire of the Police Court Judge to protect the arresting officers from civil actions for malicious prosecution. For these reasons petitioner claims that the convictions deprive him of his liberty and property without due process of law, in violation of the 14th Amendment to the United States Constitution.

An examination of the record (including the two Police Court transcripts and the two judgments of conviction referred to above, which have been made available to this court and are now ordered filed as a part of the record) shows that these Federal Constitutional claims are substantial and not frivolous.

Petitioner has no remedy in the Kentucky courts. The $10.00 fines are too small to be appealable. Review by way of the statutory writ of prohibition (KRS 26.080) is not available, since petitioner is not here questioning the legality of the loitering and disorderly conduct ordinances on which the convictions were based. The convictions can not be tested by habeas corpus, since the Police Court's jurisdiction over the person and the subject matter is not questioned. Petitioner's only recourse is, therefore, to seek review on certiorari in the United States Supreme Court, for which he may petition within 90 days after the February 3, 1959, judgments. He has stated his intention to file such a petition.

There is, however, no statutory provision for stay of execution and bail pending such application for certiorari. Under KRS 26.070, the Police Court itself is forbidden to suspend execution of sentence for more than 24 hours. Nor is there any statutory provision authorizing any other court to grant a stay and bail pending the application for certiorari. But if petitioner goes to jail for 10 days before

he can file a petition with the United States Supreme Court, he will have served out his fines (at the rate of $2.00 per day) and the cases will then be moot. It is not possible to obtain a ruling on the certiorari petition within that short a time. Thus, unless power to grant a stay and bail resides in this court, petitioner will have no way to obtain a ruling on his claims of Federal Constitutional right.

There is no wrong for which the law does not provide a remedy, and no right without appropriate procedure to protect the right. In my opinion, the petitioner has a Federal Constitutional right, under the due process clause of the 14th Amendment, which this court is sworn to uphold, to be allowed an opportunity to present his Federal Constitutional claims to the only court which has jurisdiction to entertain them—the United States Supreme Court.

It is provided by Article XIV, Section 1, of the Constitution of the United States:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Who is to say, finally, whether given action of a state is violative of the 14th Amendment? The answer is: "The Supreme Court of the United States." Very soon after the adoption of the Constitution arose the questions: "Is it with the national or the state judiciary to say whether the Union has exceeded its powers, or whether a state statute is repugnant to the Federal Constitution?" "Has the state or the nation right to answer this question finally?" It is exclusively with the Supreme Court of the United States to say, finally and decisively, whether given action of a state violates the 14th Amendment. The infraction of the amendment may be by a municipal corporation, or by a

state legislature, or by a governor of a state. Penn. Mutual v. City of Austin, 168 U. S. 685.

Mr. Justice Bradley of the Supreme Court of the United States has said that the words "life" and "liberty" cover all rights which the Declaration of Independence declares all men inalienably endowed with—"Life, liberty and the pursuit of happiness." See Butchers Union v. Crescent City, 111 U. S. 746; Allgeyer v. Louisiana, 165 U. S. 578. Many times the Supreme Court of the United States has been called upon to pass on the question as to whether or not the conviction by a state court is consistent with the due process of law required by the 14th Amendment. In Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, it is stated:

> "The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53, S. Ct. 55, 77 L. Ed. 158, 84 ALR 527. * * * The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lies at the base of all our civil and political institutions.'"

The Petitioner Thompson, through counsel, vigorously insists that there is no evidence upon which conviction and sentence by the Police Court could be based (there appears to be merit in this contention); further, that it permitted conviction although the convictions and sentences are void for want of the essential elements of due process and the proceeding thus vitiated is subject to challenge before the United States Supreme Court.

As the Petitioner Thompson has no appeal from the judgments of the Police Court to a higher state court, no state court can entertain the challenge and consider the federal question presented. If petitioner is correct in his contentions, then unless this court admits him to bail and stays the enforcement of the Police Court judgments while he is applying to the United States Supreme Court to enforce his constitutional right, he will be denied a federal right, fully established and specially set up and claimed at his trial in the Police Court.

It is not without precedent for the United States Supreme Court to review conviction of a defendant in a police court, where the convicted person claims he was denied due process of law. In Terminiello, Petitioner v. City of Chicago, 337 U. S. 1, 69 S. Ct. 245, 93 L. Ed. 1131, Terminiello was convicted of disorderly conduct, in violation of a city ordinance of Chicago, and fined $100.00. The United States Supreme Court held that the ordinance as construed and applied to him violated his constitutional right of free speech. The conviction was reversed by the United States Supreme Court because the Municipal Court of Chicago had infringed his constitutional right of free speech.

In justice to all concerned, and with the rights of the City of Louisville fully protected, I believe that the application of petitioner for stay should be granted. Therefore, it is my order that petitioner give bond, with good, approved surety, or deposit currency in the amount of $35.00, with the Clerk (the two fines are for $10.00 each and there are no court costs charged in the Louisville Police Court) of this court, that he will render himself in execution of the Police Court judgments if he fails to procure writ of certiorari from the Supreme Court of the United States. For the reasons stated above I have granted peti-

tioner's application for stay and bail, and will, therefore, enter an order granting the application for stay and releasing the petitioner; upon the execution of bond or deposit of $35.00 in currency of the United States, under an order which I will sign carrying out this opinion.

(s) Lawrence S. Grauman,
Judge.

COURT OF APPEALS OF KENTUCKY

Hugo Taustine, Judge, etc., Et Al., - - Appellants,

v.

Sam Thompson, Et Al., - - - - Appellee.

Appeal from Jefferson Circuit Court,
Common Pleas Branch, Fifth Division,
Hon. Lawrence S. Grauman, Judge.

OPINION OF THE COURT BY JUDGE SIMS—REVERSING.

This appeal is from a judgment of the Jefferson Circuit Court, Common Pleas Branch, Fifth Division, granting Sam Thompson a writ of habeas corpus against Hon. Hugo Taustine, Judge of the Police Court of Louisville, Kenneth Wildt, Bailiff of that court and Solon Russell, Sheriff of Jefferson County, wherein appellants were ordered to release Thompson from custody upon his executing bond in the sum of $35 in order that he may file in the United States Supreme Court on or before May 4, 1959, his petition for a writ of certiorari. The judgment further recites that if Thompson does not file his petition for certiorari on or before that date, or if such writ is not granted, or if the judgments of the police court are affirmed by the Supreme Court, then Thompson shall surrender himself and serve the judgments of the police court.

The petition in the circuit court averred Thompson was convicted in the police court on the charges of loitering and of disorderly conduct and he was fined $10 in each case, which fines are too small to be appealable to any court in Kentucky, KRS 26.080(1); that appellee is a poor person

and cannot pay these fines and must serve them out in jail at the rate of $2 per day.* The petition further avers Thompson is not guilty of the charges upon which he was convicted and that no evidence was introduced to support such judgments; that at the close of the prosecution's evidence in each case Thompson moved for the dismissal of the charge on the ground that he was deprived of his liberty without due process of law under the Fourteenth Amendment of the Federal Constitution, which motions were overruled; that the two fines would be served out in jail in ten days which would not allow him sufficient time to prepare and file his petition for certiorari and the question would be moot before he could get a hearing on his petition in the Supreme Court; that appellee applied to the police judge for a stay of execution, but under KRS 26.070(2) the police judge can only suspend the execution of judgment for twenty-four hours, which twenty-four hour stay was granted in order that he might file his petition for a writ of habeas corpus.

The opinion of Hon. Lawrence Grauman, Judge of the Jefferson Circuit Court, which granted the writ of habeas corpus, recites that an examination of the records of the police court, including the transcripts of evidence of the two trials, "shows that these federal constitutional claims are substantial and not frivolous." The majority of this court agree with this statement of Judge Grauman. It will be noted the judgment of the circuit court does not in reality grant appellee a writ of habeas corpus but only a stay of execution of his fines and orders him released from jail on bond until May 4, 1959, so that he may file a petition for certiorari in the Supreme Court.

*Petitioner did not in fact plead inability to pay the fines, but the Court's error on this point is immaterial. [Footnote by counsel.]

Patently, Judge Grauman realized that the writ of habeas corpus is a collateral attack on the judgments and will not lie unless the judgments are void. Com. v. Crawford, 285 Ky. 382, 147 S. W. 2d 1019; Smith v. Buchanan, 291 Ky. 44, 163 S. W. 2d 5, 145 ALR 2d 1019; Bircham v. Buchanan, Ky., 245 S. W. 2d 934. Here, the police court had jurisdiction of the subject matter and of Thompson and it is manifest the judgments are not void. To meet the exigency of the situation, Judge Grauman granted Thompson a stay of execution to allow him time to prepare and file his petition for certiorari in the Supreme Court and merely called his order a writ of habeas corpus as the order is somewhat akin to such writ.

Judge Grauman must have had in mind §110 of the Kentucky Constitution which gives this court the power "to issue such writs as may be necessary to give it a general control over inferior jurisdictions." But §110 does not give to a circuit court such control of courts inferior to it. Circuit courts in this Commonwealth have no prohibitive jurisdiction over inferior courts where such inferior courts are acting within their jurisdiction even though erroneously. If an inferior court is proceeding erroneously within its jurisdiction and irreparable injury will result to a litigant, with no adequate remedy at law, then the prohibitive jurisdiction lies in this court under §110 of our Constitution. Potter v. Trivette, 303 Ky. 216, 197 S. W. 2d 245. As the Louisville Police Court was acting within its jurisdiction, it appears that the circuit court erred in granting appellee a stay of execution, as only this court may do that under §110.

While we must reverse the judgment, the majority of this court are not inclined to put appellee to the trouble and expense, as well as the delay, of filing an original action in this court when we know that our decision will be to

direct the Louisville Police Court to stay execution of its two judgments and release appellee on bond for three months to give him time to prepare and file in the Supreme Court his petition for certiorari. Therefore, we have concluded to dispose of the matter in this opinion.

Appellee appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

Appellants urge that as 28 USCA §1257(3) provides for review by certiorari of a final judgment of the highest state court in which a decision may be had where the infringement of a constitutional right is claimed, and as 28 USCA §2101(f) provides a stay may be granted by a Justice of the Supreme Court when application is made under Rule 27 of that court, that appellee should make application for a stay to a Justice of the Supreme Court rather than to this court. Our answer to this argument is that it is often difficult to contact a Justice of the Supreme Court and may necessitate a trip to Washington. In this instance appellee may have great difficulty after preparing his petition for a stay to get same in the hands of a Supreme Court Justice in the short time of ten days.

In Walters v. Fowler, Ky., 280 S. W. 2d 523, appellant sought a writ of prohibition to prevent the collection of a $5 fine, averring that his right of due process under the Fourteenth Amendment had been violated in the imposition

of the fine and he would suffer great and irreparable injury unless the writ was granted, since he had no remedy by appeal. We denied the writ of prohibition and held that the imposition and collection of a $5 fine was not such great injustice or irreparable injury as would justify the granting of the writ. The distinction between that case and the instant one is Walters did not ask a writ of prohibition so he might go to the United States Supreme Court for its determination of whether or not he had been denied due process, while in the case at bar appellee seeks a stay of execution for that very purpose. It is only in extreme cases like the one at bar where a person wants to go to the Supreme Court that we will interfere with an inferior court under §110 when an unappealable fine has been imposed.

We reverse the judgment of the Jefferson Circuit Court because it was without jurisdiction to enter the stay of execution. But we hereby direct Hon. Hugo Taustine, Judge of the Louisville Police Court to stay until June 1, 1959, the execution of the two judgments and direct Kenneth Wildt, Bailiff of that Court, and Solon F. Russell, Sheriff of Jefferson County, to release appellee from satisfying or serving in jail the two fines imposed on him by the judgments until June 1, 1959, on condition that appellee execute bond in the sum of $35 with good surety guaranteeing he will surrender himself to the police court on June 1, 1959, if he does not file a petition for certiorari in the Supreme Court before that date, or if the Supreme Court denies his petition, or if it affirms the judgments of the Louisville Police Court.

The judgment is reversed and the clerk of this court will prepare a mandate in conformity with this opinion and cause copies of same to be sent to Judge Taustine, Bailiff Wildt and Sheriff Russell.

DISSENTING OPINION BY CHIEF JUSTICE MONTGOMERY.

According to the majority opinion, Sam Thompson complains that he has been deprived of due process of law under the Fourteenth Amendment to the Federal Constitution because the evidence in each of two cases was insufficient to sustain the conviction. The fine in each case was under the appealable amount. No complaint is made that the police court in which he was tried did not have jurisdiction of the offense or the person. The question is: May the sufficiency of the evidence to convict in a state court be reviewed in a federal court as a violation of due process under federal law? The answer is: No.

In United States ex rel. Weber v. Ragen, CA Ill., 1949, 176 F. 2d 579, it was held that the due process of law clause does not enable federal courts to review errors of state law, however material under state law, and a federal district court sits only to determine whether the proceedings in the state court amount to a violation of federal constitutional rights. Habeas corpus cannot be utilized to correct mere errors of law committed in a trial in a state court or to try such questions as sufficiency of evidence to sustain a conviction. Petition of Sawyer, D. C. Wis. 1955, 129 F. Supp. 687, affirmed, 229 F. 2d 805, cert. denied 76 S. Ct. 1025, 351 U. S. 966, 100 L. Ed. 1486, rehearing denied 77 S. Ct. 24, 352 U. S. 860, 1 L. Ed. 2d 70.

It would appear that Thompson is attempting to secure a review under a claim of infringement of constitutional right. 28 U. S. C. A. Section 1257(3). The cited cases make it obvious why he did not seek relief in the federal district court. Instead, he is attempting to get a review to which he is not entitled, under either the federal or state law, by perverting the habeas corpus process. Both this Court and the lower court recognized that the judgments of conviction

were not subject to collateral attack since they were not void. In two recent cases, Thompson v. Wood, Ky., 277 S. W. 2d 472, and Walters v. Fowler, Ky. 280 S. W. 2d 523, this Court refused to grant relief by prohibition in similar situations.

I see no reason to violate our rule and grant any relief herein, and for this reason I respectfully dissent.

Judges Moremen and Stewart join in this dissent.

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SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No [redacted]

SAM THOMPSON, - - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

On Petition For a Writ of Certiorari to the Police Court of the City of Louisville.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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May, 1959.

WEBSTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

October Term, 1958.

No. 884

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

Directly, petitioner is seeking a review of two separate judgments of the Louisville Police Court as follows:

(1) A judgment of conviction on a loitering charge on February 3, 1959, imposing a $10.00 fine.

(2) A judgment of conviction on a disorderly conduct charge on February 3, 1959, imposing a $10.00 fine.

Indirectly, petitioner is attempting to have reviewed two earlier convictions by the Louisville Police Court carefully selected from his record of more than 54 arrests (Pet. App. C, p. 31).

There are no written opinions in these two cases directly involved, nor in the two indirectly involved. In view of the fact that the average annual docket of the Louisville Police Court is more than 25,000 cases, the Police Court has neither the time nor the facilities for handing down written opinions.

However, these cases were collaterally examined in habeas corpus proceedings in which the Circuit Court rendered an opinion granting a writ of habeas corpus, and was later reversed in an opinion by the Kentucky Court of Appeals (Pet. App. B, pp. 29 and 35).

JURISDICTION.

Petitioner is seeking a review by the Supreme Court of the United States direct from the Police Court of the City of Louisville, on the theory that he has no further remedy in the judicial system of Kentucky. The Respondents seriously question this premise.

ARGUMENT ON JURISDICTION.

One of the basic requirements of Supreme Court jurisdiction to review a judgment or decree of a state court, is the exhaustion of judicial remedies in the state court. This principle is implicit in the language of 62 Stat. 929 (1948), 28 U. S. C. A., § 1257 (1949), which reads:

> "Final judgments or decrees rendered by *the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court as follows: . . ." (Italics ours.)

Therefore, if Petitioner in this case has any judicial recourse in the courts of Kentucky, this Court should not be asked to extend jurisdiction over this litigation. *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406; *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073.

It is true, as stated in the Petition for Certiorari that there is no statutory appeal from the Louisville Police Court where the fine is less than twenty dollars. KRS 26.080.

However, Kentucky, as other states, has a provision for extraordinary remedies. In Kentucky there is a constitutional grant of control to the Kentucky Court of Appeals over other courts in the Commonwealth. This authority is contained in Section 110 of the Kentucky Constitution, which reads as follows:

> "§ 110. Jurisdiction of Court of Appeals; Control of Inferior Courts. The Court of Appeals shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

Under this section, the Kentucky Court of Appeals through extraordinary writs, may control an inferior Court of this Commonwealth which is proceeding erroneously within its jurisdiction. *Childers* v. *Stephens*, Ky., 320 S. W. 2d 797; *Weintraub* v. *Murphy*, Ky., 240 S. W. 2d 594.

Certainly it would be an anomalous situation for a state court of last resort to be powerless to protect the Constitutional rights and privileges of its citizens. Indeed, our Court of Appeals removed all doubt in *Anderson* v. *Buchanan*, 292 Ky. 810, 168 S. W. 2d 48, where it stated, 168 S. W. 2d at p. 52:

> "The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person. Sec. 14. And we have already recognized that the writ of coram nobis is a part of our 'due course of law.' As stated in Hysler v. Florida, supra [315 U. S. 411, 62 S. Ct. 691, 86 L. Ed. 932]: 'This common law writ, in its local adaptation, is Florida's response to the requirements of Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process. See Lamb v. [State of] Florida, 91 Fla. 396, 107 So. 535; Skipper v. Schumacher, 124 Fla. 384, 169 So. 58; Jones v. [State of] Florida, 130 Fla. 645, 178 So. 404.' The Supreme Court held that 'Such a state procedure of course meets the requirements of the Due Process Clause.'"

Essentially, in Kentucky jurisprudence where there is no statutory relief by appeal, a proceeding under Section 110 of the Kentucky Constitution turns upon a factual determination by the highest court as to

whether or not the circumstances of that particular matter will work such an irreparable injury as to warrant interference and supervision of the inferior court by our Court of Appeals. Most of the cases cited by the Petitioner (Pet., pp. 20-21) are ones in which there was no appeal and there was no clear showing of irreparable injury. For example, in *Walters* v. *Fowler,* Ky., 280 S. W. 2d 523, the court found the evidence sufficient to dispel the contention that irreparable injury would result from payment of a five dollar fine.

However, in the instant litigation, no application under Ky. Const. § 110 was made by the Petitioner to the Kentucky Court of Appeals. The Kentucky Court of Appeals has never been directly asked to pass on the merits of the Petitioner's conviction by the Louisville Police Court. It is rank speculation to assume that the Kentucky Court of Appeals would deny an application under Section 110, finding that the instant case was not of an extreme nature and would not work irreparable injury to the Petitioner. As a practical matter, in the ancillary proceedings in this case for a writ of habeas corpus in the nature of a stay of execution (Pet. App. B), our Court of Appeals did consider this matter an extreme case and granted relief which had not been specifically asked under Ky. Const. § 110.

It is an axiom of logic that the greater includes the lesser. If our Court of Appeals considered the ancillary proceedings an extreme case, requiring its intervention under Section 110, certainly it would con-

sider an application under Section 110 on the principal proceedings, as an extreme case.

Petitioner gave our Court of Appeals no opportunity under Section 110 to protect the privileges and immunities which he now claims have been infringed by the Louisville Police Court.

QUESTIONS PRESENTED.

Respondents believe that the petitioner has not made a fair presentation of the questions for consideration by the Supreme Court. It will be noted that the keystone of the petitioner's case is the assumption (which we emphatically insist is unfounded) that the petitioner was arrested and found guilty by the Louisville police Judge solely because he retained counsel.

It should be observed that whatever constitutional rights of the petitioner might have been infringed in the cases arising out of his prior arrest in the bus station involving the witnesses, Officer Suter and Alma Ford, are not before the Court in this matter. In that case petitioner has already obtained a reversal of his conviction (Pet., p. 8, footnote) and may pursue his civil cause, if any, against Officer Suter.

When all irrelevant testimony of the Suter arrest is stripped from this petition for certiorari, there is not a shred of evidence of reprisal by the Louisville Police or the Louisville Police Judge in the two cases before this Court. The only evidence, if such it may be called, relating to reprisal in this case, may be found in the avowal of Sam Thompson, prepared by

his attorney, and appearing as Exhibit E on Page 69 of Appendix C of the petition for certiorari. Even this avowal deals with the statement of Officer Suter in the prior cases which are not before this Court, and from the vulgar nature of which, Sam Thompson and his attorney infer the reprisal for retaining counsel. The proof in this arrest is all to the contrary as the record shows that the arresting officer (Lacefield) not only did not know Thompson before his arrest (Pet. App. C, p. 10) but did not learn of his previous arrest until after petitioner's arrest in this case (*ibid*, p. 11).

Since we deny vehemently that the petitioner in the two cases before the Court was arrested and convicted as a reprisal for employing counsel, we feel that the questions presented on page 3 of the petition for certiorari are irrelevant.

Therefore as to the first question, we agree that a conviction solely as reprisal for employment of counsel violates the due process clause of the Fourteenth Amendment.

The second question is easily answered. Kentucky, by Section 110 of its Constitution, does provide judicial process whereby Federal Constitutional questions can be adjudicated in cases such as those presently before the Court. As demonstrated by the language of the Kentucky Court of Appeals in the case of *Anderson* v. *Buchanan, supra,* it is clear that our courts are as solicitous of the rights of individuals as any federal court.

As to the third question presented by the petitioner, this question is likewise answered by Section 110 of the Kentucky Constitution and the case of *Anderson* v. *Buchanan, supra.*

As to the fourth question presented by the petitioner, we believe this question is completely improper in that the premise of the question is not a part of the record; namely, that the arrests in the two cases before the Court were made in reprisal for petitioner's insistence on his right to retain counsel.

As nearly as we can determine, the two cases before the Court present solely the question of whether a former arrest grants immunity from arrest for any subsequent unlawful activities.

ANALYSIS OF RECORD.

As all trials of fact, Judge Taustine of the Louisville Police Court, in the trial of Sam Thompson, on February 3, 1959, was faced by a conflict of testimony. After a full hearing, in which the accused was very competently represented by counsel, the Judge accepted the testimony of the arresting officer as true and failed to believe the testimony of the accused. We believe the following excerpts from the record amply demonstrate the propriety of Judge Taustine's action in failing to believe Sam Thompson. These references to the record will be to the pages in Appendix C of the petition for certiorari wherein the transcript of the proceedings appear.

1. Petitioner claimed he was not dancing at the time of his arrest, but patting his foot (p. 21).

Officer Lacefield testified petitioner was dancing by himself when he entered the saloon (p. 2).

Mr. Marks, the Manager of the Liberty End Cafe, was called as a witness for the defendant, Sam Thompson. On cross-examination he admitted that Sam Thompson was doing a shuffle dance (p. 27).

Who was telling the truth, Officer Lacefield or Sam Thompson?

2. The witness Marks, Manager of the Cafe, said he had not sold any beer or anything to eat to Sam Thompson (pp. 25 and 26).

Thompson testified he bought one glass of beer and a dish of macaroni in that place (p. 19). He was uncertain whether a fellow named Bob or a waitress had served him (p. 19). Even though Thompson had not been in the Cafe since his arrest (p. 22), he did not remember the significant fact as to who had waited on him. Marks, the defendant's own witness, testified the waiter could not have served Thompson because he was washing dishes in the back (p. 30). The waitress did not testify (p. 30).

Marks on cross-examination stated he had been on the premises the whole time Thompson was there and did not see him eat or drink anything (p. 28).

In view of the foregoing does it appear that Thompson truthfully stated he had a beer and a dish of macaroni prior to his arrest?

3. Officer Lacefield testified that Thompson was very argumentative and argued with the arresting officers (pp. 2 and 3).

Thompson testified there was no argument at the time of his arrest (p. 24).

There was no other testimony on this point.

In addition to the foregoing conflicts in testimony, there is the complete implausibility of petitioner's story.

Petitioner claims he was wating for the bus in the Liberty End Cafe at 342 East Liberty Street (pp. 2, 19).

The rear end of the Liberty End Cafe is closer to the coach stop, where petitioner's bus would have stopped, than the front of the Cafe (p. 5). The nearest bus stop is half a block from the Liberty End Cafe (p. 6). For the convenience of the Court a plat of the Cafe and bus stop is shown in Appendix A of this Brief in Opposition.

Petitioner, by his own proof, could have caught either the Buechel Bus Company bus or the Blue Motor Coach bus. Each of these left its terminal at 6:15 P.M.

The Blue Motor Coach terminal is at 213 West Liberty Street (Pet. App. C, Exhibit D). The terminal of the Buechel Bus Company was at 318 West Liberty (although this does not appear in the record).

Therefore, these buses had to proceed either four and one-half or five and one-half blocks after leaving the terminal before arriving at the coach stop where

petitioner planned to catch the bus. The time of arrival at this coach stop must have been some minutes after leaving the terminal at 6:15 P.M.

Let us determine where petitioner was at the time the earlier bus was due at his coach stop.

Petitioner was arrested at 6:53 P.M. in the Liberty End Saloon (p. 1). Petitioner had been on the premises some thirty or thirty-five minutes prior to the arrival of the police (pp. 2, 25). Thompson talked to the arresting officer from five to seven minutes prior to his arrest (p. 24).

When these times are deducted from the time of arrest, it is found that Thompson entered the Liberty End Saloon sometime between 6:11 and 6:18 P.M. Meantime both of his buses had left their terminals either four and one-half or five and one-half blocks away at 6:15 P.M. An additional half a block away, dancing in a saloon, Thompson was waiting for either bus.

In evaluating the foregoing testimony, there was no violation of petitioner's constitutional rights in the failure of the police judge to believe petitioner. Every feature of his story which would be checked against other testimony was at variance with that testimony. The part of his story which could not be directly checked, namely, about waiting for a bus in a bar room, is not only implausible, but mathematically unsound.

It is an old principle of Anglo-American law that testimony *falsus in uno, falsus in omnibus.*

The police judge, having discovered certain falsities in petitioner's testimony was certainly warranted in believing the testimony of Officer Lacefield.

CONCLUSION.

The foregoing discussion reveals that petitioner in this case is, at best, premature in his application to the Supreme Court for relief, since he has given the Kentucky Court of Appeals no opportunity under its constitutional authority to review the alleged irreparable injury done to him by the Louisville Police Court.

Furthermore, the petition for certiorari reveals that the true complaint of the petitioner concerns his arrest by Officer Suter on January 14, 1959 (tried January 20, 1959); but this case is not before the Supreme Court. By indirection, petitioner seeks a sympathetic eye on the case being reviewed by physical incorporation of the extraneous January 20, 1959, proceedings. When these irrelevant proceedings are stripped from the petition for certiorari, all that remains is the conflict of testimony between the arresting officer and the accused. In view of the demonstrated falsity of some of the testimony of the accused, it was eminently proper for the Police Judge to choose to believe the testimony of the Arresting Officer, Lacefield, rather than the testimony of the accused.

Although the petition for certiorari claims directly, and not by innuendo, a gigantic scheme of the Louisville Police Force to seek reprisal against the accused,

the testimony in the case before this Court demonstrates that the arresting officer not only did not know the accused at the time of his arrest, but was not informed of the accused's other conflicts with the law until after the arrest.

For the foregoing reasons we submit that no meritorious federal question has been submitted to this Court and therefore the petition for certiorari should be denied.

Respectfully submitted,

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May, 1959.

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BUS STOP

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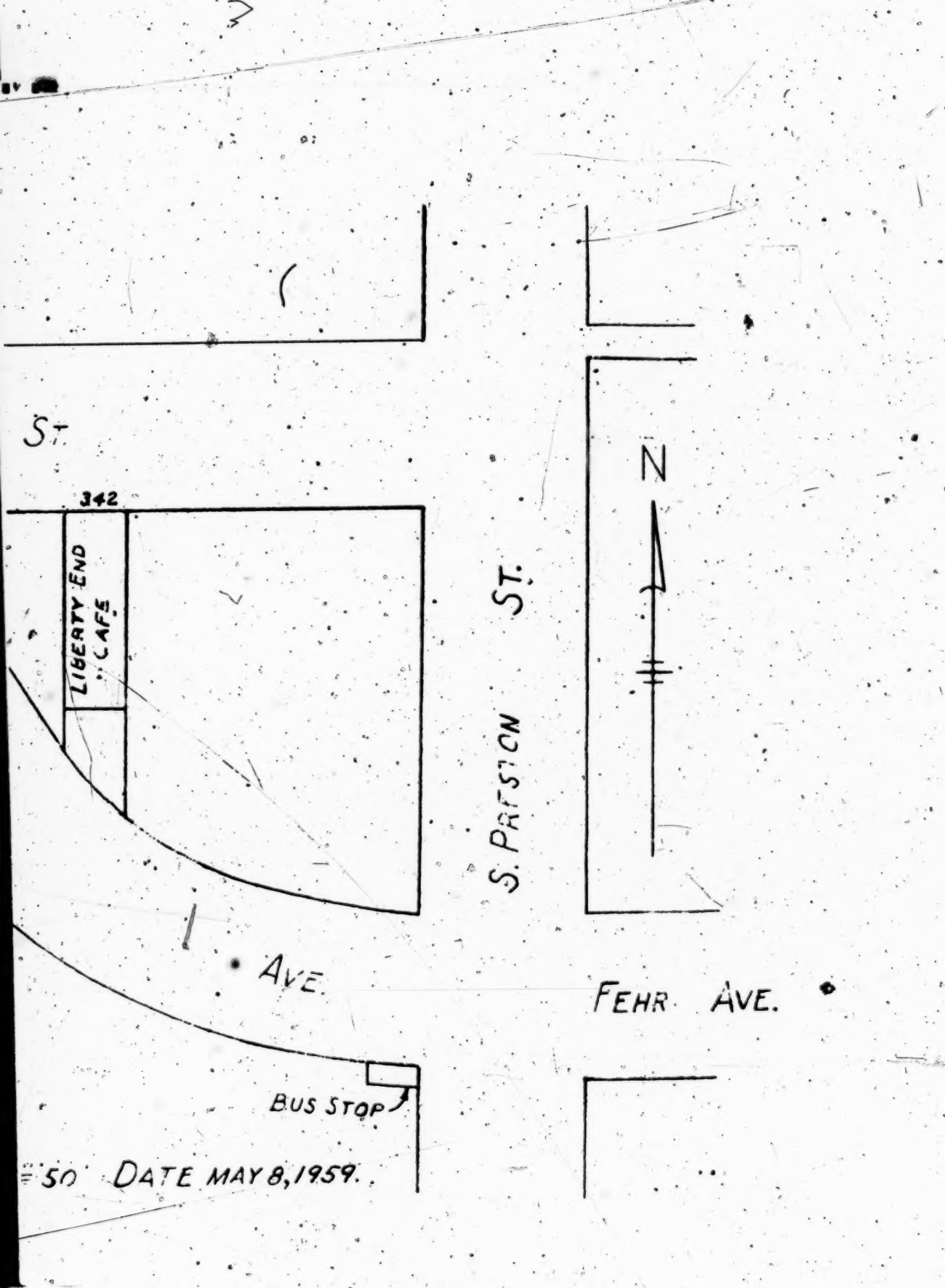
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 884

SAM THOMPSON, - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

May it please the Court:

The respondents, in their brief, do not question the importance of the questions raised but offer two arguments which require a word in reply.

First: The respondents say that petitioner has not exhausted his state remedies. But in the *habeas corpus* proceeding which was ancillary to the present case, the Kentucky Court of Appeals has explicitly held otherwise (Appendix B to Petition for Certiorari, p. 38):*

> "Appellee [petitioner] appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the

*To the same effect, see the opinion of Circuit Judge Grauman (*id.*, p. 30): "Petitioner has no remedy in the Kentucky courts."

> Federal Constitution, *yet this substantive right cannot be tested unless we grant him a stay of execution* * * *." (Emphasis added.)

The Court's opinion shows that relief on the merits under § 110 of the Kentucky Constitution was precluded by *Walters* v. *Fowler,* Ky., 280 S. W. 2d 523 (1955), and other Kentucky precedents. Indeed, this is the whole premise of the Court's ruling in the *habeas corpus* appeal. Had there been an opportunity for substantive review of the due process questions in any state court, the Court of Appeals would have had no reason to grant the stay of execution pending review by this Court.

In this connection it is to be noted that the Court of Appeals itself, on its own motion, brought § 110 into the case as a basis for the stay of execution. If it had thought that § 110 afforded an avenue for redress of the due process violations it would have said so and denied the stay. Instead, as the above quotation shows, it said exactly the opposite.

It is also to be noted that the respondents' contention as to the availability of § 110 represents a change of position on their part. They did not make this argument in the Court of Appeals, but contended there that no state court review could be had (Memorandum of Oral Argument, pp. 3-4):

> "The Court has reiterated that the right of appeal—in criminal cases or otherwise—is not a natural or inherent right, but is purely a creature of statute and a matter of grace. See 6 Ky. Dig.,

Criminal Law, Sec. 1004, and cases cited. Nor will this Court permit the equivalent of an appeal in a 'backhanded way.' Smith v. Henson, supra. Mason [*sic.* Merson] v. Muir, Ky., 284 S. W. 2d 811."

As has been seen, the Court of Appeals agreed with the respondents on this point. It is hardly consistent for them to contend now that review under § 110 was available.

Second: The respondents in their "Analysis of Record" seek to make it appear that this case involves issues of credibility. Our petition carefully excludes all such questions. It is our position that, assuming all the prosecution's evidence to be true, it is clearly insufficient to support these criminal convictions. (See Petition for Certiorari, pp. 15-16.)

Respectfully submitted,

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IN THE

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October Term, 1959.

No. 59

SAM THOMPSON, Petitioner,

versus

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COMMONWEALTH OF KENTUCKY, Respondents.

On Writ of Certiorari to the Police Court
of the City of Louisville.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - - - *Respondents.*

ON WRIT OF CERTIORARI TO THE POLICE COURT
OF THE CITY OF LOUISVILLE.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The Louisville Police Court rendered no opinion. The judgment of Jefferson Circuit Court in a *habeas corpus* proceeding brought for the purpose of obtaining stay and bail pending review by this Court is unreported, but is reproduced in Appendix B to the petition for certiorari (p. 29). The majority and dissenting opinions of the Kentucky Court of Appeals on appeal in the *habeas corpus* proceeding (styled *Taustine* v. *Thompson*) are reported at 322 S. W. 2d 100 (Ky., 1959), and are also reproduced in said Appendix B (pp. 35, 40).

JURISDICTION.

The judgments of the Police Court were entered on February 4, 1959 (R. 75-77). The petition for certiorari was filed May 1, 1959, and was granted June 22, 1959. The jurisdiction of this Court rests on 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Whether criminal convictions which are unsupported by any evidence of guilt constitute wholly arbitrary official action and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether the failure of Kentucky to provide corrective judicial process whereby Federal constitutional objections to such convictions can be adjudicated, violates the due process clause of the Fourteenth Amendment.

3. Whether such convictions deny petitioner all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. Whether, in view of the fact that the said arrests were made in reprisal for petitioner's insistence on his Federally protected rights to retain counsel and demand a trial on an earlier criminal charge, the foreclosure of effective redress against such arrests infringes said right to counsel and right to a judicial hearing, and thereby violates the due process clause of the Fourteenth Amendment.

ORDINANCES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The convictions here under review were based upon §§ 85-8, 85-12 and 85-13 of the Ordinances of the City of Louisville, which provide:

> § 85-8. *Disorderly Conduct, Penalty.* (a) Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined not less than five dollars ($5.00) nor more than one hundred dollars, ($100.00) or imprisoned not exceeding fifty (50) days, or both so fined and imprisoned.
>
> (b) In addition to imposing a fine, the Police Court may hold the offender to bail in a sum not exceeding one thousand dollars ($1,000.00) to keep the peace, or be of good behavior for any length of time not exceeding one year.
>
> (c) Should the offender fail to give bond or fail to pay the fine, he shall be forthwith committed to the city workhouse, and shall be kept in custody until bail be given, or until the time fixed by the judgment shall have expired and the fine be paid or satisfied by labor as provided by law.
>
> § 85-12. *Loitering, Prohibited.* It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville; or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained

the consent of the owner or controller of said premises, structure, or building; or for such person or persons to sleep or lie in or upon any public thoroughfare, highway, park, boulevard, or wharf of the City of Louisville; or for such person or persons to beg or solicit alms in the streets or the highways of the City of Louisville; or for such person or persons to habitually consort with bawds, thieves, malefactors, or other disreputable or dangerous characters in the City of Louisville.

§ *85-13. Penalty.* Any person violating this ordinance shall be guilty of the offense of loitering, and shall be liable to arrest therefor; and for each offense shall be punished by a fine of not exceeding fifty ($50.00) dollars, or he shall be compelled to give bond in the sum of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, conditioned upon his or her good behavior, and keeping the peace for not exceeding one year; and in default of such bond, if the same be required, the defendant shall be imprisoned in the workhouse, and there confined during the period said bond was to cover, or until the same shall be executed as required; or the defendant may be both so fined and required to execute a bond to be of good behavior as aforesaid in the discretion of the court.

Other statutes and constitutional provisions referred to herein provide in pertinent part:

Kentucky Constitution, § 110. Jurisdiction and Powers of Court of Appeals.

The court of appeals shall have appellate jurisdiction only, which shall be co-extensive with

the state, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions.

Kentucky Revised Statutes, § 26.010. Criminal and Penal Jurisdiction of police courts.

Except as provided in KRS 167.990, 199.990 and 242.990,* police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances, occurring within the city limits.

Kentucky Revised Statutes, § 26.080. Appeals to Circuit Court and Court of Appeals from police court in cities of first class.

(1) In cases where a fine of twenty dollars or more is imposed by the police court in a city of the first class, appeal may be taken to the circuit court.

(2) In cases where a fine of twenty dollars or less is imposed under an ordinance of a city of the first class, the legality of the ordinance may be tested by the city by an appeal to the circuit court, or by the defendant by a writ of prohibition to the

*Said exceptions are not material here.

circuit court, and after a decision has been rendered in the circuit court either the city or the accused may appeal from the circuit court to the Court of Appeals.

(3) In all cases where, in addition to a fine, imprisonment exceeding ten days is imposed by the police court in a city of the first class, the defendant may appeal to the circuit court, and thence to the Court of Appeals, except in cases in which bail has been required for good behavior and has not been given.

Kentucky Revised Statutes, § 26.400. Jury in Police Courts.

(1) In cities of the first class, the police court shall try without a jury all cases involving the right to the custody and care of children. It shall not impose a penalty exceeding fifty days' imprisonment or a fine of one hundred dollars without the intervention of a jury, unless the right to a jury is waived by the accused.

(2) In cities of the second class, the police court may use a jury in any case, and where the penalty may be a fine of twenty-five dollars or more or imprisonment, other than in commutation of a fine, the accused may, at or before the time the case is called for trial, demand a jury. Jurors shall be summoned by the chief of police, or by a policeman under his direction. The court shall have the same power to hold or excuse their attendance that circuit courts have. The city legislative body may fix jury fees, not to exceed those allowed in justice courts.

(3) In cities of the third class, the city or the accused may demand a jury in all cases in the

police court where the penalty may be imprisonment or a fine of more than fifty dollars.

(4) In cities of the fourth class, the accused may demand a jury in all cases in the police court where the fine may be more than twenty dollars.

(5) In cities of the fifth and sixth classes, the use of a jury in the police court in criminal cases is governed by Cr.C 319.

Kentucky Revised Statutes; § 436.520. Vagrancy.

(1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

(2) "Vagrant," as used in subsection (1) of this section and KRS 436.530 means:

(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city.

Kentucky Criminal Code of Practice, § 319. *Trial of issues of law and fact.*

The issues of law and fact shall be tried by the judge; in all cases in which the only punishment is a fine of sixteen dollars or less; in other cases the defendant may demand that issues of fact be tried by a jury.

Kentucky Criminal Code of Practice, § 332. *Jury trial; summoning jury.*

Upon a jury trial being lawfully demanded, the justice shall order a peace officer to summon a sufficient number of qualified jurors, from which the jury may be formed.

STATEMENT.

Although the case now before the Court was initiated by an arrest made January 24, 1959, full understanding of the issues requires reference to two earlier misdemeanor cases which involved arrests made January 10 and 14.* The facts of these earlier cases, in so far as they are pertinent, appear in the present record.

On January 10, petitioner was arrested without a warrant by officer F. Fletcher of the Louisville Police Force and was charged with disorderly conduct. He retained counsel and on January 12 appeared in Police Court and demanded a trial, whereupon the case was assigned for trial January 27 and he was released on bond pending trial (R. 69).†

*All dates given herein are in 1959.

†On January 27th this charge was filed away (R. 70).

At about 3:45 P. M. on January 14, two days after being thus released, petitioner was sitting in the colored waiting room of the Union Bus Station in Louisville, waiting for a bus to Buechel, Kentucky, a suburb of Louisville, where he lived. Officer Fletcher and officer Suter, another Louisville policeman, entered the waiting room and arrested him without a warrant, charging him with the crimes of vagrancy and loitering. After his arrest, while conveying him to Police Headquarters, one of said policemen subjected petitioner to verbal abuse and some slight physical abuse, giving him to understand that he had been thus re-arrested because he had retained counsel, pleaded not guilty and demanded a trial on the previous disorderly conduct charge, which would put officer Fletcher to the trouble of appearing in court to testify in that case (R. 69-70).

Petitioner again retained counsel, pleaded not guilty and demanded a trial, whereupon this case was assigned for trial January 20 (R. 69-70). The evidence is summarized at pages 5-7 of the petition for certiorari, and is commented upon in some detail at pages 48-51, *infra*. There was no evidence whatever that petitioner was guilty on either charge; the uncontradicted evidence affirmatively established his innocence.

The Court found petitioner guilty of loitering, basing the decision solely on the fact that he had been arrested before on similar charges (R. 63).

The Court rejected a request by petitioner's counsel to reserve decision until the testimony could be

transcribed and a brief filed (R. 62). The Court proposed to fine petitioner $10 on the loitering charge; but, fines under $20 not being appealable, the Court stated its willingness to impose a $20 fine on that charge. An appealable $20 fine was thereupon requested and imposed.

On the vagrancy, the Court proposed to file the charge away. Petitioner having objected to this and requested a dismissal, the Court (without further testimony or argument) found petitioner guilty of vagrancy and, though willing to impose a $10 fine, offered petitioner an appealable sentence of 30 days in jail, which petitioner accepted (R. 62-64). An appeal was perfected forthwith and petitioner was released on bond.*

At 6:53 P. M. on January 24, four days after this trial, petitioner was again arrested without warrant while waiting for a bus to his home. This time he had taken the precaution of not waiting in the bus station.† Instead, he had waited in a small tavern, the Liberty End Cafe, a few blocks east of the station and about half a block from where the bus stops (R. 19, 22). He was charged with loitering and disorderly conduct, the case being tried February 3.

The testimony on this trial is analyzed in Point I of this brief, *infra,* where it is shown that there was no evidence of guilt whatever.

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*On the appeal the case was tried *de novo* before a jury in Jefferson Circuit Court on March 18th. A verdict of acquittal was returned on peremptory instruction by the Court.

†"Mr. Suter always arrests me when I go there [to the bus station] to catch the bus to go to Buechel" (R. 54).

At the close of the prosecution's case, and again at the close of the whole case, petitioner moved to dismiss on the same Federal Constitutional grounds which are now urged in this Court (R. 33, 71) and requested an opportunity to argue the latter motion on the basis of the transcript (R. 31). The motions were overruled (R. 30). Petitioner was then found guilty of both charges. He was fined $10 on each charge, the Court not offering this time to impose appealable sentences (R. 31).

A motion for new trial on the same Federal grounds having been overruled (R. 32, 74), petitioner's remedies in the Police Court were exhausted. Because of the smallness of the fines, the judgments were not appealable to, or otherwise reviewable by, any state court. Petitioner therefore filed his petition for certiorari in this Court.

SUMMARY OF ARGUMENT.

1. There was not a shred of evidence to support the judgments of Louisville Police Court here under review, convicting petitioner of loitering and disorderly conduct and sentencing him to a $10 fine on each charge. Moreover, the uncontradicted evidence affirmatively showed that petitioner had committed neither of the alleged offenses. The actual reason for petitioner's conviction was that he had a prior arrest record.

No question of credibility is involved. Petitioner's claim that there was a complete failure of proof does

not depend upon the resolution of credibility issues, if any.

It is a denial of property without due process of law to convict and fine a defendant without evidence of guilt.

2. The convictions are not reviewable, on appeal or otherwise, in any Kentucky court. No judgment of the Louisville Police Court, however arbitrarily wrongful and however obviously unconstitutional, will be set aside if the sentence is a fine less than $20 (with or without imprisonment for ten days or less). Within these limits, Kentucky law thus vests the Louisville Police Court judge with absolute and arbitrary power.

3. The Kentucky Court of Appeals has refused to review cases such as this on the ground that $10 criminal fines do not constitute "great and irreparable injury" to the defendant. For several reasons, this position is erroneous.

First: The amount of the fines here involved, though relatively small, is large enough to work hardship on this petitioner; and they are subject to indefinite multiplication.

Second: The conviction of crime, regardless of the amount of the sentence, has serious adverse consequences upon the defendant.

Third: The right which the due process clause protects is the right to essential justice. That right is not susceptible of measurement in purely monetary terms.

Fourth: As this record shows, arbitrary Police Court power is susceptible of delegation to the police. Thus empowered, the police with impunity can and do invade the most precious liberties of the citizen, including even his right to be free of arbitrary police intrusion, which is guaranteed to him by the due process clause of the Fourteenth Amendment.

4. The arbitrary power vested in the Louisville Police Court judge has been delegated by him to the Louisville Police. This record shows that the police have arrested and prosecuted petitioner repeatedly without legal cause. Under Kentucky law the effect of the judgments of conviction entered in this case is to deprive petitioner of civil redress for malicious prosecution or false imprisonment, and thus to deprive him of the only effective deterrent against arbitrary police action. Although this circumstance has been specifically brought to the attention of the Police Court judge, he has unequivocally shown that he will under no circumstances acquit petitioner of charges preferred against him by the police. He has thus in effect licensed them to arrest him at will.

The record also shows that the arbitrary power thus conferred upon the police has been used to take reprisal upon petitioner for exercising his Federally protected right to retain counsel and demand a trial on a previous unfounded disorderly conduct charge. Although this circumstance has also been specifically brought to the attention of the Louisville Police Court judge, he has entered the judgments here complained of; and those judgments, by foreclosing the possibility of civil redress

against such police action, abrogate petitioner's immunity from punishment for exercising his right to retain counsel and demand trial. That immunity must be accorded Federal protection; otherwise petitioner's Federal right would be stripped of all substance.

ARGUMENT.

I. The Convictions Here Under Review, Being Unsupported by Any Evidence, Deprive the Petitioner of Property Without Due Process of Law.

There was *no* evidence that petitioner was guilty either of loitering or of disorderly conduct. The respondents have contended that the Police Court's decision simply resolved an asserted conflict in the testimony (Brief in Opposition, pp. 8-12), thereby implying that there was some evidence of guilt. But if all the supposed conflicts are resolved in respondents' favor, the record is still devoid of any such evidence.

In this criminal case the issues before the Police Court were necessarily defined by the charges made. "Conviction on a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362 (1937); *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948). We must therefore look to the applicable ordinances to see what conduct is penalized. The loitering ordinance provides, in pertinent part:

> "It shall be unlawful for any person * * *, without visible means of support, or who cannot give a satisfactory account of himself, * * * to sleep, lie, loaf, or trespass in or about any premi-

ses, building, or other structure in the City of Louisville, without having first obtained the consent of the owner or controller of said premises, structure or building; * * *."

The arresting officers made no inquiry as to petitioner's means of support. Petitioner affirmatively showed that he owned real property and was regularly employed (R. 14, 16-18, 45-47). The prosecutor expressly disclaimed any charge that he had no visible means of support (R. 16).

In order to prove its case, the prosecution therefore had to prove (a) that petitioner could not "give a satisfactory account of himself," and (b) that he was loafing or trespassing in the Liberty End Cafe (c) without having first obtained the consent of the owner or controller of those premises. A failure of proof on any of these three points would require an acquittal. Actually, as we shall now show, there was a failure of proof on all three of them.

(a) "*Satisfactory account of himself.*" Assuming (without conceding) that a policeman can constitutionally be empowered to require an orderly person, against whom no complaint has been made, to "give a satisfactory account of himself," and further assuming (also without conceding) that the ordinance is not void for vagueness, the record shows without contradiction that petitioner could and did give a wholly satisfactory account of himself by responsively and truthfully answering the only questions the arresting officers put to him. They asked him his name and address, which he gave them (R. 3, 22). The only other question they

asked him was "what was his reason for being in there" (R. 2). He said he was waiting for a bus to his home (R. 3). This was a "satisfactory account" under any objective definition of the term. It will hardly be contended that an account which would satisfy any reasonable man was unsatisfactory simply because the arresting officers say it was. See *Davis* v. *Schnell*, 81 F. Supp. 872, 878 (S.D. Ala., 1949), affirmed without opinion 336 U. S. 933 (1949); quoted by Mr. Justice Black in *Barsky* v. *Board of Regents*, 347 U. S. 442, 464 n. 13 (1954).

The only reason given by Officer Lacefield for considering the answer unsatisfactory was that the bus stopped half a block away and did not run directly in front of the cafe (R. 2, 6). But it is undisputed that petitioner's bus runs on a fixed schedule—an hour and a quarter between buses at that time of day—and that the next bus was not due for about half an hour (R. 23, 67). Thus there was no need for petitioner to maintain a constant lookout at the bus stop; and his election to remain indoors on that January evening, until the bus was about due, did not justify disapproval of his "account of himself."

As a matter of fact, Officer Lacefield did not contend otherwise. What he testified was that *he didn't know* the bus ran on a fixed schedule (R. 6). But the question in this criminal case is not whether the arresting officer had any reasonable basis for his mistaken belief that petitioner's "account of himself" was implausible. If petitioner's account was actually satisfactory, as it clearly was, he cannot be convicted of crime because the

officer lacked knowledge of the easily ascertainable (and generally known) fact that suburban buses run on schedules. Petitioner had the bus schedules in his pocket (R. 19)* and could easily have explained his "account of himself" if an explanation had been called for. But the officers, in their eagerness to effect the arrest, made no further inquiry. So far as appears, they did not even tell petitioner why they considered his account of himself to be unsatisfactory. (Nor has the prosecutor done so: Nor the Police Court judge.)

(b) *"Sleep, lie, loaf, or trespass."* There is no claim that petitioner was asleep or lying down. He could not have been a trespasser, since the manager of the cafe knew he was there and made no objection to his presence (R. 27). Respondents' claim must be that he was loafing.

Petitioner had been in the cafe a little over half an hour before he was arrested (R. 2). He testified without contradiction that he had bought a dish of macaroni and a glass of beer from a waitress or attendant other than Mr. Marks, the manager (R. 19).

The fact that petitioner, after finishing his meager meal, lingered in the cafe on that winter night, chatting with his friends and shuffling his feet to the music of the juke-box as he waited for his bus (R. 21), is no evidence of criminal loafing. If that rather vague term could be stretched to cover such conduct, half the population of Louisville would be criminals.

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*We regret that a printer's error has occurred at page 19 of the printed record. Reference to the original certified transcript will show the question at the 7th line from the bottom of that page should read, "Did you have a bus schedule with you?".

(c) *"Consent of the * * * controller of said premises."* The record can be searched in vain for any evidence that petitioner entered or remained in the cafe "without first having obtained the consent of the owner or controller of said premises." When the owner of the cafe hung out its sign and opened its doors, he invited petitioner and other members of the public to enter. As is said in 52 Am. Jur., tit. "Trespass," § 39:

> "Consent may be implied from custom, usage, or conduct. Thus, the opening of an office to transact business with the public is a tacit invitation to all persons having business with the proprietor, and a permission to others, to enter his place of business." (Footnotes omitted.)

Mr. Marks, the controller of the premises, knew that petitioner was there. He made no objection to anything petitioner did, and did not ask him to leave (R. 27, 29). No clearer proof of consent could be demanded.

The consent question can be disposed of even more simply. Under the loitering ordinance, lack of consent is an element of the offense. The prosecution had the burden of proving it. Mr. Marks was in court and available to testify. But the prosecution offered no scrap of evidence on the issue. The failure of proof was complete.

As for the disorderly conduct charge, the only evidence was that after petitioner's arrest "he was very argumentative—he argued with us back and forth" (R. 3). There was no charge that petitioner had re-

sisted arrest, or attempted to escape, or doubled up his fists, or used bad language, or even raised his voice. His testimony that he was respectful to the arresting officers (R. 24) is uncontradicted. The only evidence as to the substance of the conversation was petitioner's testimony that "I just asked them what they arrested me for" (R. 24). For all that appears, he may simply have been continuing his endeavor to give them a "satisfactory account of himself."

For two reasons, this evidence failed to prove disorderly conduct. In the first place, petitioner's conduct after his arrest was not disorderly, and could not have been punished as such even if the arrest had been lawful. Courts of other states have consistently held that simple argument with an arresting officer does not constitute disorderly conduct. See, *e.g.*, the cases collected in Annotation, 34 A. L. R. 566, 568-570. Vague as the term is, it is not without limits; and there is no reason to believe that the Kentucky courts would repudiate these authorities and adopt the dangerous notion that an arrested person must desist from all efforts to convince the police that they have erred.

As a matter of fact, the Kentucky Court of Appeals has made it clear that one *must* object to an arrest which he believes to be illegal, in order to avoid waiving his right to be forthwith informed of the charge against him as provided by § 39 of the Criminal Code of Practice. In *Nickell* v. *Commonwealth,* 285 S. W. 2d 495 (Ky., 1955) the Court held that the right had been waived because the defendant had acquiesced in the arrest. The Court said (at p. 496):

> "He [the defendant] did not ask why *or indicate any notion that his rights were being imposed upon* by being arrested without cause. He readily submitted to the arrest and must be deemed to have waived a full compliance by the officers of the technical requirements." (Emphasis added.)

Surely action which is necessary to preserve a valuable procedural right cannot be considered criminal. Compare *Sternberg* v. *Hogg*, 254 Ky. 761, 72 S. W. 2d 421 (1934).

In the second place, petitioner was privileged not merely to argue but even to resist the arrest until he was informed of the nature of his alleged offense. *Johnson* v. *Commonwealth*, 240 Ky. 337, 42 S. W. 2d 341, 342 (1931). There was no showing that the argument (if any) took place before or after the arresting officers told petitioner what he was being charged with. Officer Lacefield testified that the argument occurred outside the cafe (R. 3) and petitioner testified without contradiction that he was not told the nature of the offense until he asked the officers what he was arrested for—which he did after they had taken him outside (R. 24-25).

Our purpose in reviewing the evidence has not been to burden this Court with the resolution of evidentiary conflicts but to demonstrate that the Court need not concern itself with them. The respondents have declared that the case involves only a "conflict of testimony between the arresting officer and the accused" (Brief in Opposition, p. 12). We have shown that it is not so. Resolving all credibility questions in respondents' favor, the record is still empty of any evidence of guilt.

In their effort to make this into a fact case, the respondents have purported to describe some evidentiary conflicts which do not exist (Brief in Opposition, pp. 9-11). A brief comment, in order to keep the record straight, is therefore appropriate.

(a) There is no conflict as to the nature of petitioner's dancing. Officer Lacefield did not describe it, except to say that it was a solo dance and was not obscene or vulgar (R. 2). Defendant said he was patting or tapping his foot (R. 21). Mr. Marks said petitioner was "patting his foot—he was moving his foot and going down like this" (R. 26). He accepted the prosecutor's description of the dance as a "shuffle dance" (R. 27). The trial judge declined to let the dance be demonstrated in court by petitioner or Officer Lacefield (R. 9, 21). There is no reason to doubt that each of the witnesses, in his own words, was describing the same thing.

(b) Mr. Marks did not contradict petitioner's testimony about the beer and macaroni. To be sure, he testified that *he* did not see the petitioner eat anything, and when first asked by the prosecutor whether he wouldn't have known about it if petitioner had had anything to eat or drink, he tentatively answered, "It seems like I would." But immediately afterward, on his own volition, he made the flat statement that his failure to see petitioner buy anything "don't mean he didn't buy anything" (R. 28).

(c) Respondents have engaged in a painstaking analysis of time intervals in an effort to show that petitioner could have caught the 6:15 P M. bus if he had

wanted to. We are somewhat puzzled at their emphasis on this point. Even if he could have caught the earlier bus, what of it? The fact that he missed one bus does not tend to impeach his "account of himself"; he was surely entitled to wait for the next one. And we fail to understand how respondents can criticize him for taking time to get something to eat and drink—which he would hardly have had time to do before the earlier bus came, even if respondents' time schedule were correct.

In fact, however, it is not correct. Respondents' elaborate chain of inferences starts with the fallacious premise that officer Lacefield, in fixing the time of the arrest at 6:53 P.M., was referring to an event which took place 5 to 7 minutes after petitioner had been taken outside the cafe. But the officer's uncontradicted testimony was that the arrest took place *inside* the cafe (R. 1). Mr. Marks confirmed this (R. 26). The 5 to 7 minute interval thus drops out of respondents' time schedule.

The foregoing review of the evidence shows that there was no factual basis whatever for the adjudications of guilt. The question is thus one of law, not of fact. As this Court said in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109-110 (1902):

> * * * if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts

being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being *a question of law simply*, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. *Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.*" (Emphasis added.)

It should now be clear that these convictions, being unsupported by any evidence, constitute a naked assertion of arbitrary judicial power—the very antithesis of due process of law. Even in an alien deportation case, and even on collateral attack, this Court has held (*U. S. ex rel. Vajtauer* v. *Commsisioner*, 273 U. S. 103, 106 (1927)):

> "Deportation * * * on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus.*"

See also *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (due process held denied where "the whole proceeding is a mask").

In Point II of this brief we shall discuss the constitutional objections to arbitrary official power. In Points III and IV we shall show how arbitrary power has affected the petitioner. But first let us see how it affects a court which possesses it.

The present record affords an unusually illuminating insight into the concrete meaning of arbitrary power, as it exists in the Louisville Police Court. Until now we have examined the evidence from a negative viewpoint, our objective being to demonstrate that the record does *not* contain any evidence of guilt. We have therefore put on our appellate blinders and have excluded from consideration that part of the proceedings which are not relied upon by the respondents as constituting evidence of guilt.

Strictly speaking, this is enough. Having established that the judgments cannot be based on any lawful premise, petitioner need not go further and show what particular *unlawful* premise they *were* based on. Were that required, the due process prohibition upon arbitrary action would in many cases be impossible to apply; for a tribunal can often remain silent as to the actual reasons for its action, and indeed it will have a natural tendency to do so if it realizes that those reasons are legally insufficient.

But now let us take off our blinders and see what the record tells us about the Louisville Police Court.

At the beginning of the January 20 trial the Police Court judge was evidently unaware that petitioner had ever been arrested before. And for a time he conducted the trial in fairly close conformity with the law, manifesting no reluctance to protect petitioner's procedural rights and apply the accepted principles of the law of evidence. He granted petitioner's motion for a separate trial (R. 36). He sustained a hearsay objection (R. 36). He excluded from evidence a felony record offered by the prosecution when it was shown to belong to another Sam Thompson much older than petitioner (R. 38).

Then, in the course of cross-examination by petitioner's counsel, the arresting officer who was the sole prosecution witness (officer Suter) volunteered that he had arrested petitioner before. *From then on the Court did not make a single ruling in petitioner's favor, either in that trial or in the trial which followed on February 3* (R. 40). Each of the many admissibility points, and each of the issues as to the sufficiency of the evidence, was summarily resolved against him. The judge's mind had frozen as soon as the previous arrests were disclosed to him.

Indeed, he specifically said so. In finding petitioner guilty of loitering at the January 20 trial, he said (R. 63):

> "The officer has testified he has arrested this man before on similar charges and I am basing my decision on that."

And the prior arrests were evidently a determining factor also in the February 3 convictions here under review. At the close of that trial, and just before finding petitioner guilty, the Court said, in an evident attempt to justify the convictions (R. 31):

> "Let the record show that the prosecutor has shown me a record for this defendant totaling fifty-four arrests."

The pertinent point is that the judge was not acting on a purely visceral basis. He was applying a *rule*—a rule that no defendant who has an arrest record will be acquitted. Moreover, it makes no difference whether it is a *long* arrest record; at the first trial there was no showing how many times petitioner had been previously arrested, there being simply a reference to "arrests" (R. 40). But this was enough to preclude an acquittal.

To be sure, such a rule has no remote connection with the law; but it is a rule nevertheless. It provides a basis for predicting future action under like circumstances.

Respondents have said that the Louisville Police Court handles more than 25,000 cases a year (Brief in Opposition, p. 2); and we have no reason to doubt their word. This is half a thousand cases a week. It is safe to assume that many if not most of the defendants who stream through that Court have been arrested before. Thus, if we make the charitable assumption (which, as we have shown, the record tends to bear out) that the Court applies its rule impartially in all cases which

come before it, the present case cannot be regarded as an isolated phenomenon. The brand of "justice" accorded to petitioner must also be meted out in a very large number of other cases.

In this connection it should be noted that the record contains no indication that the trial judge had any particular personal animus toward the petitioner. Had the Court been so inclined, it could have fined him $19.99 and jailed him for 10 days on each of the charges, without stepping outside its charmed circle of unappealability. (See Point II, *infra.*)

The picture of the Court which thus emerges is a more chilling one than if the record disclosed downright sadism or neurotic caprice. It is the picture not of an evil court, but of a court confident that its motives and methods are in conformity with the desires, or at least the best interests, of the community. In short, it is the picture of dispassionate, impersonal, systematic, *institutionalized* disregard for the law. And there is no reason to doubt that it is the picture not of one court alone but of many or all of the courts which, under the Kentucky statutes soon to be discussed, can insulate their rulings from review.

It should not be forgotten that it is in the police courts that most people get their first and only close look at the majesty of the criminal law. Not many of them will take appeals, even if they receive appealable sentences. Still fewer will bring their cases here.

There have been intimations that the Louisville Police Court should be indulged because of its heavy case load. That is presumably the point of respond-

ents' reference to the annual docket of 25,000 cases. The same notion may account for the prosecutor's indignation at the efforts of petitioner's counsel to obtain a full hearing and make a full record, which were criticized as an attempt "to make a big case out of a minor one" and "to make a federal case out of * * * this * * * two-bit case" (R. 31, 62). The contention seems to be that the Police Court's simple rule equating previous arrests with present guilt is the only way the docket can be cleared.

A narrow but sufficient answer is that it takes no more time to decide a case in accordance with the plain evidence than to decide it the other way. As a matter of fact, it often takes less. Each of the two trials reported in the present record should properly have ended in acquittal as soon as the arresting officer had stated the empty reasons for the arrest. And it would be interesting to know how many of the 25,000 cases disposed of each year would never come before the Court if the police were shown that unfounded charges would be dismissed.

A broader and better answer, however, is that the right to essential justice cannot be subordinated to administrative convenience. The Constitution does not permit. It has been well said that one man's red tape is another's due process. We do not suggest that a police court must observe the procedural niceties of a Federal District Court. But we do insist that, for the simple reason that it is a *court*, it can rightly be called upon to administer *law*, and to administer it with due regard for the minimum requirements of procedural fairness. *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (Mayor's Court).

II. Unappealable Police Court Judgments Are Not Subject to Any Mode of Review in the Kentucky Courts, Even Where Federal Constitutional Rights Have Been Denied. Such Denial of Corrective Judicial Process Vests the Police Court Judge With Absolute and Arbitrary Power.

It is an unusual and rather startling thing, in this day and age, to be confronted with arbitrary power in the original and primary sense of the term. Not infrequently this Court has been called upon to define and enforce the due process requirement of fundamental procedural fairness; and in so doing, it has prescribed certain minimum requirements, such as preservation of the right to counsel and exclusion of coerced confessions, without which grave injustice may be done even by courts which submit without reservation to the rule of law. But the Court has rarely had to deal with a claim that, in a limited but important class of cases, a state can reject the rule of law itself. That question is presented by this record.

Kentucky law empowers the judge of the Louisville Police Court to deal with persons who come before him in accordance with his own personal whim. He can ignore the procedural requirements of the Federal and state constitutions. He can disregard the rules of evidence. He can flout the substantive criminal law. He can adjudicate wholly innocent conduct to be criminal. And, having convicted an innocent defendant, he can fine and imprison him. So long as he does not exceed his territorial jurisdiction (the city limits) and does not entertain charges of offenses punishable

by more than $500 fine and 12 months imprisonment (KRS § 26.010), and so long as he imposes no sentence large enough for appeal, his decision will not be set aside by any Kentucky court.

This medieval state of affairs results from (a) the statutory limitation on appeals, coupled with (b) the denial of all other state court review of unconstitutional convictions in cases involving sentences too small to appeal. Either of these elements, by itself, might give rise to no constitutional objection. But together they spell arbitrary power.

The Kentucky statutes do not permit appeals from courts of limited jurisdiction in criminal cases unless the punishment exceeds a certain amount. The amount varies with the court. The decision of a county judge or a justice of the peace or of a police court in a city of the second, fifth or sixth class, is appealable if the sentence is for any imprisonment or for a fine of $20 or more (Criminal Code of Practice, § 362; KRS §§ 26.090 and 26.120). Different minima are prescribed for appeals from police courts in third and fourth class cities (KRS §§ 26.100 and 26.110).

Review of decisions of police courts of cities of the first class (of which Louisville is the only one) is regulated by KRS § 26.080, which is set forth at pages 5-6, *supra*. Under this statute a defendant who is fined as much as $20, or who is fined less than $20 and imprisoned for 10 days or more, can appeal.* Cases in-

*Construed literally, the statute would forbid appeal of a sentence of imprisonment (up to the jurisdictional maximum of 12 months established by KRS § 26.010) unless a fine were also imposed. But we have found no reported decision on this question, and recognize the possibility that an equitable interpretation might be adopted.

volving the legality of an ordinance can be reviewed regardless of the amount of the fine, the statutory writ of prohibition being available for this limited purpose. The statute forbids review in all other cases. The Kentucky Constitution empowers the legislature to determine the limits of appellate jurisdiction, and its failure to provide for appeals of fines less than $20 is binding on the courts. *Merson* v. *Muir,* 284 S. W. 2d 811, 812 (Ky., 1955).

This $20 minimum, incidentally, applies to each fine separately. Where two or more charges are tried together, the sentence on each one is considered separately in determining appealability. Thus, two $10 fines are not appealable though a single $20 fine would be. *Adams Express Co.* v. *Commonwealth,* 175 Ky. 825, 195 S. W. 109 (1917); *American Railway Express Co.* v. *Commonwealth,* 187 Ky. 241, 218 S. W. 453 (1919). Circuit Judge Lawrence S. Grauman and all seven judges of the Kentucky Court of Appeals have so declared. See Petition for Certiorari, Appendix B, pages 30, 35, 40.

Despite the limitation on appeals, the circuit courts have jurisdiction to issue common law writs of prohibition and habeas corpus to afford preventive and remedial relief where police courts and other inferior courts have exceeded their jurisdiction. See *Potter* v. *Trivette,* 303 Ky. 216, 197 S. W. 2d 245 (1946), and cases there cited. But in Kentucky, "jurisdiction" means simply jurisdiction over the parties and subject matter, and does not afford any remedy against violation of constitutional rights in the course of trial. See

Smith v. *Buchanan*, 291 Ky. 44, 163 S. W. 2d 5, 7 (1942):

> "We are aware that some opinions of some courts appear to hold that a denial to a litigant of some constitutional right renders the judgment void, but most courts take the opposite view and say that so long as the court has jurisdiction in the premises the matter complained of—although it be a denial of such constitutional guaranties—constitutes only an error correctible by appeal if the error appears in the record and the question is thereby presented to the Appellate Court."

To the same effect, see *Owen* v. *Commonwealth*, 280 S. W. 2d 524, 525 (Ky., 1955).

The only other possible avenue of redress in the state courts against constitutional violations not involving an excess of jurisdiction would be an application to the Court of Appeals for relief under Section 110 of the Kentucky Constitution, which confers upon that court "power to issue such writs as may be necessary to give it a general control of inferior jurisdictions." On its face, this provision seems to hold out a possibility of relief. But the Kentucky Court of Appeals, which has the final authority to interpret the Kentucky Constitution, has repeatedly and conclusively held that Section 110 affords no basis for relief from a criminal sentence which is too small to appeal.

The question was squarely presented in *Thompson* v. *Wood*, 277 S. W. 2d 472 (Ky., 1955), where Section 110 was held not to authorize relief from a $10 fine imposed by the County Judge (sitting as judge of

Quarterly Court) in a reckless driving case. The Court held that such relief was available only if it was necessary to prevent (a) great injustice and (b) great and irreparable injury; and that a $10 fine could not be a great and irreparable injury. The Court declared (at pp. 474-475):

> "Petitioner does not bring himself within that part of the rule to the effect that great and irreparable injury will be done him if the writ be not granted, since the only punishment inflicted, a fine of $10 and costs, is of such minor severity as that the Legislature did not believe it of sufficient importanee to provide for an appeal to the circuit court. Were this Court to intervene in such a situation as this, it would tend to turn this Court into a trial court to ascertain the guilt or innocence of those being tried in inferior courts."

In *Walters* v. *Fowler*, 280 S. W. 2d 523 (Ky., 1955), another original action for relief under Section 110, the petitioner, who had been arrested without a warrant along with 113 other people in a dragnet police operation and had been fined $5 for breach of the peace, claimed that the conviction violated his rights under the 14th Amendment due process clause as well as the state constitution. The Court refused to entertain his claims, holding that *Thompson* v. *Wood* was controlling and saying (at p. 524):

> "This result may seem harsh to the petitioner, and we are inclined to feel sympathetically toward him. However, the Legislature, in its wisdom, has not seen fit to authorize an appeal from a $5 fine.

The proceeding used by petitioner is nothing more than an attempt to appeal from the judgment of an inferior court when no such appeal is authorized. The failure or refusal of the Legislature to provide for such an appeal is within its power and discretion. Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632.

"For the reasons stated in Thompson v. Wood, *supra*, the writ of prohibition is denied."

The rule was adhered to in *Merson* v. *Muir*, 269 S. W. 2d 272 (Ky., 1954), 284 S. W. 2d 811 (Ky., 1955). The Louisville Police Court had fined the defendants $15.00 each for disorderly conduct "upon a plea of not guilty" *although no sworn testimony was offered.* Its judgment was held to be immune from review.

Thus, the Kentucky Court of Appeals, by adhering to the strict common law definition of jurisdiction, has first held the circuit courts powerless to redress due process violations in the police courts and like tribunals. And it has then closed its own doors to such cases on the ground that a man is not injured very much by being adjudicated a criminal, however unjustly, so long as he is not fined very much (or, presumably, imprisoned for very long). So far as the Louisville Police Court is concerned, the due process clause has thus been rewritten to read: "* * * nor shall any State deprive any person of life, of more than ten days of his liberty, or of $20 or more of his property, without due process of law."

In the stay proceedings ancillary to the present case, the Kentucky Court of Appeals foreclosed any possible doubt that, under the rule of *Walters* v. *Fowler*, this case is unreviewable on the merits by any Kentucky court. The Court of Appeals reaffirmed and restated the *Walters* rule, but said that the rule did not apply because the present defendant, unlike Walters, was not seeking state court review on the merits; he was only asking for a chance to bring his case to this Court. The Court of Appeals thus held that while a violation of the due process clause did not itself constitute great injustice and great and irreparable injury justifying relief under Section 110 from a fine too small to appeal, the threatened deprivation of the ancillary due process right to an *opportunity for a hearing* in this Court on the constitutional claims would constitute such injustice and injury as justified the granting of the stay. The Court of Appeals declared (Petition for Certiorari, Appendix B, pp. 38-39):

> "Appellee appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, *yet this substantive right cannot be tested* unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. * * *
>
> "In Walters v. Fowler, Ky., 280 S. W. 523, appellant sought a writ of prohibition to prevent the collection of a $5 fine, averring that his right of due process under the Fourteenth Amendment

had been violated in the imposition of the fine and he would suffer great and irreparable injury unless the writ was granted, since he had no remedy by appeal. We denied the writ of prohibition and held that the imposition and collection of a $5 fine was not such great injustice or irreparable injury as would justify the granting of the writ. The distinction between that case and the instant one is Walters did not ask a writ of prohibition so he might go to the United States Supreme Court for its determination of whether or not he had been denied due process, while in the case at bar appellee seeks a stay of execution for that very purpose. *It is only* in extreme cases like the one at bar *where a person wants to go to the Supreme Court that we will interfere with an inferior court under § 110 when an unappealable fine has been imposed.*" (Emphasis added.)

The Court has thus said, as plainly as words can say it, that the most it can do for a man in petitioner's situation is to usher him into this Court. If he asks for relief from the conviction itself, as Walters did, he will fail.

Moreover, as pointed out at page 2 of our reply brief in support of the certiorari petition, it is clear that the Court of Appeals' failure to set aside the convictions did not result from the fact that petitioner had foregone the futile gesture of requesting it to grant such relief.* The Court *on its own motion* granted relief

*Even if relief under Section 110 had not been plainly unavailable, petitioner would not have been required to bring a separate collateral action for such relief before petitioning for certiorari to review the final and unappealable Police Court judgments. *Largent v. Texas*, 318 U. S. 418 (1943).

under Section 110 although petitioner had not asked it to do so but had instead sought relief through a different channel. Had relief on the merits been possible, there is no reason why it could not and would not have been granted instead. The Police Court judge, who would have been the respondent in an original proceeding under Section 110, was before the Court. If ancillary relief could be spontaneously granted under Section 110, as the Court did, there was no procedural obstacle to a similar grant of substantive relief.

The Court of Appeals, while expressly finding that the petitioner's Federal constitutional claims "are substantial and not frivolous," has thus held that no Kentucky court can hear those claims. In the words of the Court of Appeals, they "cannot be tested" unless access to Federal review is preserved. The Court of Appeals has thus rejected the principle announced in *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884):

> "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or

deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

See also *Mooney* v. *Holohan*, 294 U. S. 103, 113 (1935).

Petitioner has of course not sought review of the decision of the Court of Appeals in his case, since the relief he sought was granted. Strictly speaking, therefore, that Court's disclaimer of obligation to adjudicate Federal constitutional claims of the type here involved may not be directly reviewable in this case. But its position is pertinent to the present discussion, since it shows, in the context of the present case itself, that Kentucky imposes no restraint whatever on police court action of the type here involved—no matter how arbitrary.

The foregoing review of Kentucky law shows that absolute and arbitrary power has been vested in the Louisville Police Court. By virtue of its complete power to keep its sentences below the appealable minimum, it can preclude any possibility of review by a higher state court. But this is not all. Not only does Kentucky law enable it to insulate its *judgments* from all attack, no matter how lawless they may be; it also enables it to insulate *itself* from the restraining influence which might be exerted by a public opinion aroused at the spectacle of unjudicial behavior. What makes this possible is the virtual abolition of the right to a jury trial.

Where the right to a jury trial is granted, and is honored by the court, two consequences follow. First, the jury can exercise its traditional function of protecting the citizen from oppressive official action. Second, and equally important, the formal separation of the legal and factual issues makes it necessary for the judge to articulate his legal premises. In his rulings on evidence and in his instructions to the jury on the substantive law of the case, the judge can hardly avoid disclosing whether he is applying or defying the law which is supposed to guide his rulings. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431-432 (1935). Judicial defiance of the law would create an issue clear enough for review in the forum of public opinion, even though the particular defendant had no redress against it. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U. S. 257, 270 (1948).

But where there is no jury, the judge can and often does limit himself to the bare announcement of the sentence to be imposed. Without full review and analysis of the evidence, no outsider can form an opinion as to whether the law has been followed or not. And it is too much to expect that the press or the general public would undertake the labor of such review and analysis, or would have the background legal knowledge necessary for such a task.

To be sure, a grant of the *right* to a jury trial does not itself impose any legally binding restraint on

judges of Kentucky's courts of limited criminal jurisdiction. It has been held that they can, without fear of reversal, direct a jury to return a verdict of guilty (though the Court of Appeals has solemnly declared that the law does not permit it), or even refuse a jury trial to which the accused is legally entitled. Such an error is not deemed to be jurisdictional, and therefore affords no basis for reviewing a sentence too small to appeal. *Williams* v. *Pierson,* 301 Ky. 302, 191 S. W. 2d 574 (1945). But here again, defiance of the law by an official sworn to uphold it might at least create an issue sufficiently clear for the weight of public opinion to be brought to bear.

Except in the Louisville Police Court, Kentucky law keeps alive this possibility of public scrutiny by granting the right to a jury trial except for the most trifling offenses. In police courts of cities of the second to sixth classes, and in the county court, quarterly court, and justice of the peace courts, the existence of the right depends upon the severity of the *maximum possible* sentence. KRS § 26.400 (2), (3), (4), (5); Criminal Code of Practice, §§ 319 and 332. Thus, for example, in police courts of fifth and sixth class cities, the right exists wherever the punishment may be imprisonment or a fine of $16 or more. In no court is the right denied in cases where the penalty can be imprisonment or a fine exceeding $50—except in the Louisville Police Court.

In that court the test is not what the punishment *may be* but what it *turns out to be.* KRS § 26.400 (1) (*supra,* p. 6) provides:

> "In cities of the first class, the police court shall try without a jury all cases involving the right to the custody and care of children. It shall not impose a penalty exceeding fifty days' imprisonment or a fine of one hundred dollars without the intervention of a jury, unless the right to a jury is waived by the accused."

Thus, no legal right of the accused is denied if he is put on trial without a jury for any offense within the court's jurisdiction (*i. e.*, offenses punishable by no more than $500 fine and 12 months imprisonment). Not until the end of the case does he learn whether he had a right to a jury. If at that time the judge sentences him to more than 50 days in jail, or imposes a fine of $100 or more, his right to a jury turns out to have existed—though of course this is a matter of academic interest only, since *Williams* v. *Pierson, supra,* holds that his only recourse is to take an appeal. If the sentence is too small for appeal, it is *a fortiori* too small for a jury trial, and the right to a jury trial has never come into being at all.

The statute has been held constitutional. *Houk* v. *Starck,* 251 Ky. 276, 64 S. W. 2d 565 (1933).

Under the circumstances, denial of a demand for jury trial in Louisville Police Court involves no unlawful conduct on the part of the judge. All the law does is to impose a meaningless *limit upon punishment* where a jury has been demanded and refused. Trials in that court are therefore heard by the judge alone, as trier of the law and the facts. The proceedings are informal, all parties and witnesses being sworn together,

and standing with counsel in a semi-circle in front of the bench as the testimony is given. The testimony is not taken down by the official court stenographer (except in felony examining trials, KRS § 26.310) unless the defendant employs him to do so. And, as stated in respondents' Brief in Opposition (p. 2) the judge does not write opinions to explain his rulings.

The power of the Louisville Police Court to impose small fines and jail terms is thus absolute. It is vested in a single official, unrestrained by the presence of a jury, whose premises of action need not be articulated and thus laid open to public view. The existence of such power negates the rule of law.

This Court, as the citadel of ordered liberty, has been ever vigilant to preserve the rule of law by curbing arbitrary official power whenever and however it has been asserted. At least since the adoption of the Fourteenth Amendment, the Court has uncompromisingly set its face against arbitrary state action in any form. The principle was stated in *Hurtado* v. *California*, 110 U. S. 516, 535-536 (1884):

> "*Law is something more than mere will exerted as an act of power.* It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' *so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,'* * * *." (Emphasis added.)

And the Court explicitly recognized its own role as guardian of the rule of law (*id.*, p. 536):

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process* is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (Emphasis added.)

The principle was reaffirmed and enforced in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369-370 (1886):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that *they do not mean to leave room for the play and action of purely personal and arbitrary power.* * * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Emphasis added.)

And again, in *Leeper* v. *Texas*, 139 U. S. 462, 468 (1891), and *Maxwell* v. *Dow*, 176 U. S. 581, 603 (1900), the Court declared:

> "* * * due process is * * * secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Nor have those principles faded with the passing years. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *In re Oliver*, 333 U. S. 257 (1948); *In re Murchison*, 349 U. S. 133 (1955).

The interdict upon absolute power applies to every agency of the state and its municipalities. It makes no exceptions for judges. This Court has explicitly declared that the requirement of due process is not "satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial." *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). Arbitrary abuse of judicial power subjects the consequent judgment to reversal here. *Moore* v. *Dempsey*, 261 U. S. 86 (1923). Indeed, the judge himself is not protected by his office from personal accountability for judicial actions forbidden by the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339, 348-349 (1879).

In *Griffin* v. *Illinois*, 351 U. S. 12, 18-19 (1956), Mr. Justice Black said:

> "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct

> adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."

Perhaps he should have said that all the states *but one* have recognized the importance of appellate review. As we have shown, Kentucky has not only rejected *appellate* review of small sentences, but has withheld *all* review. The result has been to make the Louisville Police Court a little enclave of arbitrary power. The United States Constitution forbids.

III. An Arbitrarily Wrongful Criminal Conviction Is Not Rendered Constitutional by the Imposition of a Small Sentence.

The Kentucky Court of Appeals has held that due process objections to a criminal conviction are not justiciable in Kentucky if the ensuing sentence is a $10 fine. The stated basis for this position is that in such a case no "great and irreparable injury" has been sustained. Let us examine this proposition.

Even if the only harm inflicted upon petitioner by the two convictions had been the two $10 fines, he would have standing to claim the protection of the due process clause. Twenty dollars is not a lot of money, but to a man whose weekly earnings often do not exceed $12 it is by no means *de minimis.**

*Petitioner also paid a $25 attorney fee for representation at each of the trials (R. 70).

This Court has not hesitated to set aside, on due process grounds, a $10 fine imposed by the Police Judges Court of San Francisco for violation of an ordinance of that city. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). If the *Yick Wo* case was not too small to justify the attention of this Court, petitioner's case should not be too small for the Kentucky Court of Appeals.

Moreover, the fines are subject to indefinite multiplication. If no evidence is needed for conviction, there is no limit to the number of charges which can be brought. As is shown in Point IV of this brief, the Louisville police have in effect been licensed to arrest the petitioner at will. Unless this Court intervenes, he can look forward to an indefinite series of groundless prosecutions.

The fines, however, are only a small part of the harm done to petitioner. A conviction of crime, even if the sentence is nominal or suspended, is itself an injury. Criminal status may close the door to employment prospects, to credit extension, to a whole variety of future opportunities. It can also affect the sentence to be imposed in later cases, where the defendant need not even be told that the sentencing court is taking the prior convictions into account. *Williams* v. *New York*, 337 U. S. 241 (1949). Indeed, as noted above, the record shows that in this very case petitioner has been convicted because of his prior arrests.

The present record does not show how many of those arrests resulted in convictions, or how many of the convictions were unsupported by any evidence of guilt. It does however show that *one* prior arrest (the January 14 arrest) was illegal, and that *one* prior conviction (the January 20 conviction) was without legal foundation. For all that appears, the others may have been equally groundless. For all that appears, any prior convictions may have resulted only in fines or jail terms too small for appeal. But they have had their effect. It will not do to say that a small sentence deprives a criminal conviction of its essential sting.

We have thus far examined only the material consequences of convictions and sentences such as these. Beyond this, and on a level of deeper and more universal significance, is the harm which is suffered from injustice itself. The time has not yet come when Americans can be dealt with as economic men. Their needs and their rights are not measurable in purely monetary terms. One of their needs is justice, and in this country they have a legal right to receive it.

It is the bald denial of *justice* which is the matter of constitutional concern, not the $10 mulcts as such. A state court can deprive a man of a million dollars, or of life itself, without creating an issue for this Court. It is the denial of *due process* that gives rise to the Federal question.

We hold that justice is a real thing having an objective existence and knowable attributes. It is the solvent which converts raw power into morally binding law. The courts are privileged to seek it and to define

its meaning in particular contexts, but they are powerless to alter its substance.

There are cases where the pursuit of justice is a complex matter, and reasonable judgments may differ as to where it leads. But there are also cases—and this is one of them—where even a simple man can know that justice has been denied him. And that knowledge is a grievous hurt.

The hurt done by a denial of justice is not easy to describe, but it is nonetheless real. A man's sense of innate dignity, his conception of himself as a person unique yet part of a community, his feeling of proud security in the impartiality of the law—impairment or destruction of these values cannot be measured in money. Yet such a hurt can shatter a man. And that is the hurt which is done when justice is denied.

If there be anyone who doubts it, let him look at these two trials through a defendant's eyes. Let him then consider whether *he* could measure in money the injury done him by the injuries which appear in this record; and let him consider further whether his injury would be any the less because the *additional* injury inflicted by the sentence was relatively small. In addition to the more comprehensive injustices which are discussed elsewhere in this brief, let him consider these specific actions of the Court:

(1) On January 14 petitioner was arrested in a bus station without a warrant on charges of vagrancy and loitering, and on January 20 he was brought to trial. The prosecution introduced no evidence of any

criminal conduct. The sole prosecution witness, one of the arresting officers, said (R. 37):

> "I smelled wine on this man's breath (indicating the defendant Thompson) and I charged Thompson with vagrancy and loitering *because he didn't give me any proof as to working anywhere.*"

No law forbids the drinking of wine. No law requires a man to carry proof of employment. No law requires a man to answer a police officer's questions. (Even the loitering ordinance refers to persons who "*cannot* give a satisfactory account of * * * themselves," not those who *do not.*)

Plain justice required that the charges be dismissed on the basis of the officer's own statement of the reasons for the arrest. A motion to dismiss was overruled (R. 44).

(2) At the January 20 trial, before petitioner had testified, the prosecution offered evidence of previous arrests. (The Court later said this evidence was decisive.) Every lawyer knows that such evidence, since it has no tendency to prove any material fact, is inadmissible as affirmative proof of guilt. Even a *conviction* of *felony* cannot be proved except for impeachment purposes, and does not become admissible until after the impeachable witness has testified.

Plain justice required exclusion of the evidence. But petitioner's objection was overruled (R. 40).

(3) At the same trial petitioner then affirmatively showed, by the uncontradicted testimony of himself and two disinterested witnesses, that he was in the bus

station for the legitimate purpose of catching a bus; that he had told the arresting officers so, and had thus given a "satisfactory account of himself"; that he had regular employment—"visible means of support"; and that the implied consent to his presence at the bus station (where he had been only five minutes and thus could hardly have been "loafing") had not been withdrawn by the owner or controller of the premises. He thus disproved each of the three elements of the offense of loitering.

Plain justice required a dismissal of that charge. But he was told that his previous arrests rendered him guilty (R. 62).

(4) Believing that a more careful review of the evidence might persuade the Court of its error, petitioner through his counsel asked leave to file a brief on the basis of the transcript. No great delay would have resulted, and (as is shown elsewhere in this brief) the consequences of an erroneous decision were potentially serious.

Plain justice required that defendant be permitted to assemble the pertinent legal authorities. The request was denied (R. 62).

(5) There was no evidence of vagrancy, and petitioner introduced uncontradicted evidence that he had not violated any of the four branches of the vagrancy statute (KRS § 436.520). He proved that he had "an occupation at which to earn an honest livelihood"; that he had "visible means of support"; that, being unmarried, he had not "deserted his wife or children";

and that he did not "habitually refuse to work." Indeed, the Court's offer to file that charge away (R. 63) amounted to a *finding* that there was no proof of vagrancy; for if guilt had been proved, the Court's clear duty was to say so.

Plain justice required that the vagrancy charge be dismissed, and petitioner so moved. Without hearing any further evidence, the Court found petitioner guilty of vagrancy (R. 63-64).

(6) Petitioner was offered and accepted appealable sentences, perfected his appeal forthwith, and was released on bond (R. 70). Four days later, on January 24, he was arrested in the Liberty End Cafe. He was tried and convicted February 3. The evidence has been analyzed at pages 15-22, *supra*, and the plain injustice of the convictions has been shown. Here again the previous arrests were evidently decisive.

(7) In the course of the second trial, after officer Lacefield had stated the reasons which had led him to arrest petitioner for loitering, the Court on its own motion suggested a further reason for the arrest—that petitioner was "dancing" in a place not licensed for dancing (R. 9). No law forbids such dancing, and petitioner was not charged with violating any such law. Plain justice forbade the injection of such a charge into the case.

(8) Later in the trial, petitioner detailed his income and expenses to show "visible means of support" (R. 17-18). The judge claimed "judicial knowledge" of facts as to other expenses, of which there was no

evidence, and ignored an objection (R. 18). The rules of evidence cannot conceivably be stretched to permit judicial notice of such facts; and if a judge sitting as trier of the facts has personal knowledge of matters pertinent to the case, plain justice requires him to disqualify himself just as a juror must do.

* * * * *

Returning now to the question whether petitioner has suffered a deprivation over and above the fines and the other material consequences of his convictions, we say that he has been robbed of access to equal justice under law, which is the common birthright of every American. He has been shown that no "hearing" is available, in the meaningful sense of the term, because the evidence and arguments adduced on his behalf are disregarded as completely as if they had not reached the judge's ears; for him, a trial is but a formal prelude to a foreordained result. He has been put outside the law.

These are not trivial hurts. Such hurts as these are not comprehended in or measured by the $10 fines. Such hurts as these, visited upon millions of freedmen, led to the adoption of the Fourteenth Amendment. It is to heal such hurts as these that the due process clause exists.

IV. "The Security of One's Privacy Against Arbitrary Intrusion by the Police," and the Right to Retain Counsel and Demand a Trial on Criminal Charges, Are Guaranteed by the Fourteenth Amendment Due Process Clause. Those Freedoms Are Abridged by the Arbitrarily Wrongful Convictions in This Case.

We have shown, we think, that the injury directly resulting from the convictions and sentences themselves is by no means trivial. But there is more. We shall now show that the Police Court judge has in effect licensed the Louisville police to arrest petitioner at will, and to take reprisal upon him for resisting a previous unfounded criminal charge by retaining counsel and demanding a trial.

This is made possible by a restriction imposed by Kentucky law on actions for false arrest and malicious prosecution. Kentucky follows the generally accepted rule that an action for malicious prosecution cannot be brought unless the prosecution has terminated in favor of the accused. See *Van Arsdale* v. *Caswell*, 311 S. W. 2d 404, 406 (Ky., 1958):

> "It is well settled in this state that before a suit for malicious prosecution may be maintained, the plaintiff must aver and prove the action alleged to have been maliciously prosecuted has finally terminated in his favor, which is a condition precedent to the maintenance of an action for malicious prosecution. Conder v. Morrison, 275 Ky. 360, 121 S. W. 2d 930; Central Acceptance Corp. v. Rachal, 264 Ky. 849, 95 S. W. 2d 777. See annotation, 135 A. L. R. 793; 34 Am. Jur.,

'Malicious Prosecution' (1957 Pocket Supplement) § 31, p. 90."

Consequently, by convicting a defendant and imposing upon him a sentence which cannot be reviewed, the Police Court can forestall the civil action.

The danger of civil liability is the only effective deterrent to arbitrary police action in such situations as this. The sanctions of the criminal law are within the control of the public authorities, not private complainants. If petitioner were to swear out a warrant charging officer Lacefield with the crime of unlawful arrest (KRS § 435.150), the case would be heard in Louisville Police Court, sitting either as a misdemeanor trial court or as a felony examining court. If petitioner by some means were to seek direct grand jury action, he could do nothing without the aid of the County Attorney or the Commonwealth's Attorney except to appear alone at a secret grand jury hearing and give his version of the facts. The grand jury would then privately hear such other witnesses (including the police officers) as they or one of the said prosecutors should desire to call. It would be almost laughable to suggest that a lay grand jury would have either the inclination or the ability to pass upon the correctness of the Police Court decision. But unless they did so, and found that the convicted defendant in the Police Court case was in fact innocent, they would have no basis for an indictment of the police officer.

It might be thought that even if an unappealable Police Court conviction thus closes the door to a civil trial of the maliciousness of the *prosecution,* it leaves open the question of the legality of the *arrest*—for of course the adjudication of guilt is not a determination that the arrest was legal. Even a guilty man may be wrongly arrested. Thus, if petitioner were able to sue for false imprisonment, the danger of civil liability might be an effective deterrent to arbitrary arrest without a warrant; all the police could do with impunity would be to harass him with repeated accusations initiated by citation rather than arrest. Although he might thus be subjected to considerable annoyance, attorney fees and small criminal sentences, he would at least be able to walk the streets as a free man, untouched by the constant fear that he would be captured and held for ransom.

In most states the unreversed Police Court conviction would not bar a false imprisonment action. 22 Am. Jur., tit. "False Imprisonment", § 29; Annotation, 25 A. L. R. 1518. Kentucky, however, departs from this general rule. In Kentucky it has long been settled that in a false imprisonment action, even though favorable termination of the criminal proceeding need not be *pleaded* (*Southern Railway Co.* v. *Shirley,* 121 Ky. 863, 90 S. W. 597 (1906)), the defendant can establish a complete defense by proving an unreversed conviction. *Barger* v. *Cook,* 9 Ky. Op. 584 (1877); *Griffin* v. *Russell,* 161 Ky. 471, 170 S. W. 1192 (1914); *Waddle* v. *Wilson,* 164 Ky. 228, 175 S. W. 382 (1915).

Thus, an unappealable Police Court conviction deprives the accused of all civil redress. And this deprivation is effected in a proceeding where the legality of the arrest, as such, is ordinarily not even an issue on which evidence can be offered. Unless the Police Court is called upon to determine the admissibility of evidence seized in a search incident to a questioned arrest, evidence that the arrest is illegal would be irrelevant to any material issue.

The unusual Kentucky rule restricting false imprisonment actions raises an interesting due process question as to the legality of summary arrest. Due process requires that some effective procedure be provided for redress against abuse of that fearsome power. This Court has upon occasion upheld summary official action, taken without prior notice and opportunity for hearing; but in each such case the validity of the action was upheld solely because judicial review on the merits was available at some later time. See *Lawton* v. *Steele*, 152 U. S. 133, 142 (1894); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315-320 (1908), quoting with approval the opinion of Holmes, J. in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100 (1891). And when such review on the merits is not available, due process is held to have been denied. *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 197 (1933).

The Kentucky Court of Appeals has recognized the importance of granting redress against the malicious abuse of other summary process. In *Goode* v. *Commonwealth*, 199 Ky. 755, 758, 252 S. W. 105 (1923), it held that a search warrant should issue only upon

an affidavit in such form as to expose the instigator to a civil action if he has acted maliciously. Presumably the same rule would apply to an arrest warrant. But where the arrest is without a warrant, Kentucky law affords no hearing on its legality if defendant is found guilty and given an unreviewable sentence in Police Court, unless he happens to have a hearing in that Court on the legality of a search—an issue not raised in the present case.

Thus, by arbitrarily and wrongfully convicting the petitioner the Louisville Police Court has not only subjected him to the $10 fines and the other hurts discussed in Point III of this brief. It has also denied him all redress against arbitrary and malicious arrest.

The convictions therefore deprive petitioner of his liberty without due process of law. By denying him all effective redress against wrongful arrest, they expose him to the unrestrained will of the police. If it be suggested that the objection goes to the legality of the *arrest* rather than the validity of the *judgments*, the result is the same; for the Police Court acquired jurisdiction of petitioner's person only by virtue of the arrest, and the illegality of the arrest would therefore render his convictions void.

In addition to denying redress against these particular arrests, the convictions have a broader effect. As has been noted (*supra*, p. 26) the Police Court has acted on the basis of a *rule*—the rule that previous arrests preclude acquittal. Presumably the existence of such a rule would quickly become known to the police from simple observation of the Court's rulings,

even if it were not spelled out for them. In this case, however, it has articulated the rule in unmistakable terms. If the police did not know the rule before petitioner's January 20 trial, they learned it then. And four days later, in the Liberty End Cafe, they used the power which the Court had confirmed to them.

It will hardly be contended that the Police Court judge and the police are unaware of the Court's power to protect the arresting officers from civil actions, or that the Court does not take the possibility of a civil action into account in arriving at its decision. The Court's willingness to file away the vagrancy charge but not to dismiss it can be explained in no other way.

The practice of filing away rather than dismissing unproved charges has been developed as a means of enabling the Police Court to accomplish two apparently inconsistent results—to grant leniency to an innocent defendant without terminating the case and thus opening the way to a civil action. The practice was brought to the attention of the Court of Appeals in *Van Arsdale* v. *Caswell, supra,* where an accused person whose case had been filed away had sued for malicious prosecution. The Court was urged to hold that filing away is a termination of the prosecution favorable to the defendant. An opposing brief *amicus curiae* was submitted by the Louisville Police Officers Association, affirming the Police Court's right to forestall civil actions in this way. The Court declined to accept this contention, saying (311 S. W. 2d at p. 407):

"The amicus curiae brief of the Louisville Police Officers Association vigorously argues trial

courts are justified in 'filing away' a warrant or indictment as it protects citizens and police officers from suits for malicious prosecution, since such an order indefinitely continues the case and prevents a final determination thereof. The answer to that argument is that the mere termination of a criminal prosecution does not give the defendant therein a right of action for malicious prosecution. He must allege and prove that he has been accused of a crime without probable cause."

But the Court of Appeals declined to hold that filing away is a termination of the criminal case. All it did was to announce that the defendant had a right to object to the filing away, and that if the Police Court then refused either to try the case or to dismiss it, the filing away would be a final order for purposes of appeal. The present case shows that this is an empty remedy. The only result of an objection to the filing away is to incur an otherwise avoidable conviction (R. 63-64).

The record contains other indications too that the possibility of a civil action in the event of acquittal has not escaped attention. That possibility always exists, of course; but when the defendant in a misdemeanor case follows the unusual course of employing the official reporter to record the evidence, and when defense counsel then cross-examines the arresting officer in such a way as to explore the full circumstances of the arrest, the possibility is emphasized. That is the meaning of the prosecutor's odd suggestion at both trials that petitioner's counsel was trying to "intimidate" the officer (R. 9, 63).

The January 20 trial showed petitioner that his arrest record would prevent his acquittal of any later charge, at least unless he proved something more than his innocence. And the Court obviously had the *power* to preclude a civil action in this way. But without conceding that it was lawful for the Court thus to prejudge the question of false arrest, which is theoretically a matter for determination by a civil court sitting with a jury, petitioner thought it possible that if he could not only prove his innocence but *also* could convince the Court that the two arrests were malicious in fact, and indeed represented an attempt to punish him for making use of the Court's own processes, the Court might decide to open the way to a civil action.

Petitioner therefore offered to prove that the January 14 arrest had been made in reprisal for his action in retaining counsel and demanding trial on an earlier disorderly conduct charge, which had since been filed away. The avowal was specific and detailed (R. 69-70), but the offer of proof was rejected (R. 20). In addition, he showed through the testimony of Mr. Marks, the cafe manager, that one of the officers who made the January 24 arrest had known of the previous incident in the bus station and had referred to it just before arresting petitioner (R. 26)—evidence which, in the light of the facts stated in the avowal and the absence of any real reason for arresting petitioner in the cafe, clearly tended to show the existence of a connected plan. Officer Lacefield's denial of any prior knowledge of the bus station arrest (R. 11) does not

contradict Mr. Marks' testimony as to what officer Barnett had said.

Having thus offered evidence that the arrests had resulted from wilful malice, petitioner's counsel requested an opportunity to argue the case on the basis of the transcript (R. 31).

This would have given an opportunity for argument of the Federal questions here presented, which had been raised on two motions for dismissal (R. 13, 30, 33, 71). The request was denied.

The only apparent result of petitioner's effort was that he was given unappealable instead of appealable sentences. Thus it would seem that the explicit request for access to the civil courts simply hardened the Police Court judge's determination to deny such access.

By rejecting this last possible effort of petitioner to obtain relief from its rule that previously arrested defendants will not be acquitted, the Police Court judge has informed the police in unequivocal terms that they can with impunity arrest petitioner whenever they see him. He has granted them a hunting license. The Police Court's arbitrary power to impose small fines and jail terms has thus been so used as to enable the police to exercise arbitrary power of their own over petitioner's very right to walk the streets of Louisville and enter its places of public accommodation.

This extension of arbitrary power beyond the limits to which it was nominally confined by the appeal statute is not unprecedented, or even a cause for astonishment. Arbitrary power, once established, tends to proliferate like a cancer. This Court has developed the doctrine of

unconstitutional conditions to deal with other aspects of this phenomenon. *Blake* v. *McClung*, 172 U. S. 239 (1898) (privileges and immunities, Art. IV, § 2); *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922) (removal to Federal courts); *Frost* v. *Railroad Commission*, 271 U. S. 583 (1926) (due process); *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490 (1927) (equal protection).

The hunting license granted to the police is not limited to the hunting of petitioner. This record discloses the nature of the general police practices which have grown up under the umbrella of the existing legal situation. Officer Suter, who arrested petitioner on January 14, and officer Lacefield, who arrested him on January 24, testified that the arrests were made in the course of a "routine check" or "fair check" of places of public accommodation (R. 2, 36). What this really means, as the testimony at the first trial shows in some detail (R. 59), is that the police enter such places as restaurants and bus stations and, without search warrants or arrest warrants, require whomever they please to account for their presence, show proof of employment, and otherwise explain their circumstances. If the explanation is unsatisfactory to the arresting officer an arrest is made and petty charges filed.

Such police methods are alien to our institutions. They constitute a standing threat to the freedom and privacy of all. And it is no longer open to doubt that the due process clause forbids a state to confer arbitrary power upon the police. See *Wolf* v. *Colorado*, 338 U. S. 25, 27-28 (1949):

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

See also *Irvine* v. *California*, 347 U. S. 128, 132 (1954).

The gravity of the situation would be plain enough if the case involved only a dispassionate effort on the part of the police to prevent persons whom they considered undesirable from frequenting public places. But this case involves an even broader incursion upon the common right. This petitioner has been twice arrested and prosecuted not because of any diffuse attitude of official disapproval but for the specific reason that he retained counsel and demanded trial on a previous unfounded charge. To deny him all possibility of redress against such reprisal is to eviscerate the rights which lie at the very core of due process.

That the Fourteenth Amendment due process clause guarantees the right to counsel and the right to a hear-

ing is too well settled for argument. *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (1930). The existence of a Federal right necessarily implies a Federally protected immunity against harassment, reprisal or punishment for exercise of that right. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Johnson* v. *Maryland,* 254 U. S. 51 (1920), and cases there cited; *N. A. A. C. P.* v. *Alabama, ex rel. Patterson,* 357 U. S. 449 (1958). Such reprisal in the present case consisted not only of the arrests and fines themselves, but also of necessary expenses for bail bonds and attorney fees which taxed the petitioner's slim resources to the utmost (R. 69-70).

The foregoing discussion shows that the essential issue in the present case is not the validity of the ordinances under which petitioner has been prosecuted, but the arbitrariness of the judgments. It actually makes no difference at all what ordinance or statute the petitioner is accused of violating. So long as his arrest record rather than his conduct is the basis of his convictions, little can be accomplished by an attack on the particular ordinance or statute which is the formal but not the actual reason for the prosecution. There would always be another ordinance or statute which could be made the excuse for a new criminal charge.

It cannot be rightly contended that these due process violations are chargeable solely to the police and do not infect the court action here under review. The judgments of conviction are the essential means

whereby the police have been invested with arbitrary power and immunized from liability for its wrongful exercise. The punishment which those judgments inflict is an expected consequence of the illegal January 24 arrest, and thus is a portion of the intended reprisal. It has long been settled that a judgment which perfects and implements an unconstitutional action of state officials is itself reversible. For the Louisville Police Court is not only bound to avoid participating in violations of the United States Constitution, but also has an affirmative obligation to redress such violations. As was held in *Neal* v. *Delaware*, 103 U. S. 370, 397 (1880):

> "The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States. * * * Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning."

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgments of the Police Court of Louisville entered February 3, 1959, should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

On Writ of Certiorari to the Police Court
of the City of Louisville.

BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

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October, 1959.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

ON WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

OPINIONS BELOW.

The court below issued no opinion, but its judgments are set forth at R. 75-77.

JURISDICTION.

The judgments of the court below (R. 75-77) were entered on February 3, 1959. The petition for a writ of certiorari was filed on May 1, 1959, and granted on June 22, 1959 (R. 81). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTES AND ORDINANCES INVOLVED.

The pertinent provisions of the Louisville General Ordinances (§§ 85-8, 85-12, 85-13, 61-25(a), 61-46, 61-55, 67-15, 67-18, 67-39) and of the Kentucky Revised Statutes (§§ 26.010, 26.080, 95.150, 244.080, 244.120) are set forth in the Appendix, *infra*, pp. 23-28.

QUESTIONS PRESENTED.

Section 85-12 of the Louisville General Ordinances provides in relevant part that no person, without *visible* means of support *or* unable to render a *satisfactory* account of himself, shall loaf or loiter "along . . . the public . . . thoroughfares"; nor shall such a person "loaf, or trespass in or about any . . . building" without the owner's consent.

The Louisville Police Court, having exclusive jurisdiction over the enforcement of ordinances, has construed these ordinances (pursuant to the legislative intent to forbid loitering or loafing "along", or at the side of, city streets and walks) to include public places situated at the side of these public ways, such as bus stations, saloons, and parking lots. Such activities on premises which are not "public places," are not forbidden, provided the owner or controller has expressly consented to them.

The questions presented are:

1. Whether the evidence was sufficient to support the convictions, and therefore meets the requirements

of the due process clause of the Fourteenth Amendment.

2. Whether the failure of the state to provide appellate review of constitutional claims arising out of misdemeanor convictions involving fines of less than twenty dollars, violates the due process clause of the Fourteenth Amendment.

3. Whether convictions with small and non-appealable fines deny a person all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. (a) Whether in the case before this Court there is sufficient evidence of reprisal for petitioner's insistence on retaining counsel and demanding a hearing.

(b) Whether frequent convictions for misdemeanors involving non-appealable fines must be interpreted as being reprisals for retaining counsel and demanding a hearing in violation of the due process clause of the Fourteenth Amendment.

STATEMENT.

On January 24, 1959, the petitioner was arrested in a public place, a tavern, for violating the loitering ordinance (R. 2) by: (1) loitering or loafing in a public place—a tavern—along a city thoroughfare; and (2) trespassing or loafing, *i. e.*, dancing, in a building without the express consent of the owner or controller, where such dancing was prohibited by law.

Upon being informed of his arrest and the nature of the charge, the petitioner became unruly, resulting in a disorderly conduct charge (R. 3).

Both the loitering charge and the disorderly conduct charge were heard in the Louisville Police Court on February 3, 1959, where the petitioner was found guilty and fined ten dollars on each charge (R. 75-77). The fines were not paid, making it mandatory for him to serve them out at the rate of $2.00 per day; or a total of ten days in jail.

Claiming that his Constitutional rights were violated, with no existing remedy of appeal, the petitioner obtained a stay of the judgments (R. 75-79) and filed a petition for a writ of certiorari to issue from this Court (R. 81).

We believe it only fair to the Court to point out that petitioner's Statement (Pet. Brief, p. 9 through second paragraph, p. 10) concerns two cases, not before it, of a trial on January 20, 1959 (R. 35). All that is properly a part of the record in the cases before this Court is the testimony of Dr. Wynant Dean (R. 34). The remainder of the proceedings were not stipulated. Therefore, neither the first few pages of the Statement, nor pages 31-44 and 47-64 of the Record, are properly before this Court.

SUMMARY OF ARGUMENT.

I.

The findings of the police court that the petitioner had violated both the loitering ordinance and the disorderly conduct ordinance were based on sufficient evidence. There is no merit to the petitioner's contention that there was a complete failure of proof, and that the evidentiary conflicts are not in issue.

Even if it could be successfully argued that the police judge accorded undue weight to the Commonwealth's evidence, rather than to the evidence of petitioner, as to the charge of loitering, the *arrest* on the loitering charge was nevertheless valid and the ensuing disorderly conduct charge is supported by sufficient evidence.

II.

The absence of appellate review in Kentucky, in cases where small fines are levied, is not unique. On the contrary, it is one of the historic facets of Anglo-American law. Until comparatively recent times, there was no appeal from *any* criminal conviction.

III.

It is plainly conjectural to argue that Kentucky affords no redress against arbitrary arrests which result in non-appealable convictions, when that question was never raised below, and the state's highest court has never been given the opportunity to rule on the question.

IV.

There is no merit to petitioner's contention that his arrests were reprisals for retaining counsel and demanding a hearing. The appearance of counsel is the rule, rather than the exception, in cases pending before the Louisville Police Court which are not traffic violations.

ARGUMENT.

I. Petitioner's Convictions Were Supported by the Evidence.

The loitering ordinance, § 85-12 of the Louisville General Ordinances, provides in part (App. A, p. 25):

> "It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville, or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ."

The Louisville Police Court has exclusive jurisdiction over all offenses arising under the city ordinances. § 26.010 of the Kentucky Revised Statutes (App. A, p. 26). It has construed § 85-12, *supra,* to forbid loitering "along," or at the side of, public thoroughfares, as well

as "upon . . . in or through" public ways. Loitering in public places "along" the thoroughfares, under this construction, falls within the prohibition of the act. In Kentucky, a "combined beer tavern and restaurant is a public place." *Ginger* v. *Commonwealth* (1953), Ky., 262 S. W. 2d 179.

As to loafing on premises which the law does not classify as a "public place," the Police Court has properly construed this section to mean that a person who enters premises for any purpose other than that for which the general public is invited, must obtain the consent of the owner or controller. This consent must be express. One cannot claim the immunity of an implied consent to be on the premises, when he has entered with a surreptitious purpose contrary to that for which the public is invited.

The reason for the foregoing construction is obvious. It covers those situations where loiterers wander off the streets and into parking lots, theater lobbys, saloons, and other public places, with no legitimate purpose at hand. This Court has demonstrated that where the evil sought to be prevented is apparent, a reasonable construction of the language employed is justified. *United States* v. *Walter* (1923), 263 U. S. 15, and such a construction by a state court should be respected. *Elmendorf* v. *Taylor* (1825), 23 U. S. (10 Wheat) 152, 159; *Shelby* v. *Guy* (1826), 24 U. S. (11 Wheat) 361, 367.

The regulation of loitering and vagrancy in public places (including buildings) is a common practice, e. g., *Ex Parte* Strittmatter (1910), 58 Tex. Crim. 156,

124 S. W. 906, 907; *King* v. *State* (1914), 74 Tex. Crim. 658, 169 S. W. 675, 677; *Robinson* v. *State* (1916), 15 Ala. App. 29, 72 So. 592; *Williams* v. *District of Columbia* (1949), D.C., 65 A. 2d 924, 926; and is a valid exercise of the police power. *Phillips* v. *Municipal Court of Los Angeles* (1938), 24 Cal. App. 2d 453, 75 P. 2d 548, 549; *City of Toledo* v. *Wagner* (1937), 57 Ohio App. 160, 13 N. E. 2d 136, 138; *State* v. *Starr* (1941), 57 Ariz. 270, 113 P. 2d 356, 358; *People* v. *Parker* (1955), 208 Misc. 978, 138 N.Y.S. 2d 2, 8, 9; Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L. J. 1351 (1950).

The Louisville police have "all the common law and statutory powers of constables, . . ." KRS 95.150(1) (App. A, p. 27). § 36(2) of the Kentucky Criminal Code (App. A, p. 28) provides that a peace officer may make an arrest *without a warrant* when a public offense is committed in his presence. Of course, a policeman is a peace officer. *Elam* v. *National Surety Co.* (1923), 201 Ky. 74, 255 S. W. 1039, 1041. Peace officers at common law could arrest without a warrant and in lieu of statute, *inter alia*, to prevent an imminent breach of the peace. In addition, there were a few exceptional cases of misdemeanors for which a peace officer could arrest without a warrant on suspicion largely, as suspicious nightwalkers, streetwalkers, and vagrants. *Wheelhorse's Case*, Poph. 208, 79 Eng. Rep. 1297 (K. B. 1627); *Rex* v. *Bootie*, 2 Burr. 864, 97 Eng. Rep. 605 (K. B. 1759); *Lawrence* v. *Hedger*, 3 Taun. 14, 128 Eng. Rep. 6 (C. P. 1810).

Thus, the police have the power to make arrests for violations of the loitering ordinance anywhere they see such violations taking place. It will not be necessary to argue the authority of the police to make arrests for violations in their presence even if they are *unlawfully on the premises, Ex Parte Ajuria* (1922), 57 Cal. App. 667, 207 P. 515, because in this case, § 61-25(a) of the Louisville General Ordinances (App. A, p. 23) makes the condition that every person licensed by the City to sell alcoholic beverages consents to the entry of the police at all reasonable hours for the purpose of inspection and search. Cf. *Marron* v. *United States* (1927), 275 U. S. 192, 198.

In summary, the police could—and did—arrest the petitioner on either of two grounds:

1. Loitering or loafing in a public place along a public thoroughfare; or

2. Loafing or trespassing in premises (whether or not a public place) without having first obtained the express consent of the owner or controller.

As the evidence clearly shows, the police entered the tavern for the routine inspection (R. 2) authorized by § 61-25(a) of the city ordinances. (App. A, p. 23). They discovered that the petitioner had purchased nothing and had been there for over a half hour (R. 2, 25, 26). The only evidence that petitioner had purchased anything was the testimony of the petitioner himself, and he could not—or would not—even say whether a man or a woman made the sale (R. 19)! The petitioner's reason for being there was to wait for

a bus (R. 2), although he confided at the trial that he didn't know what time the bus was due (R. 23) and demonstrated that fact by testifying that it was due at 7:15, when in fact in was *not* due then (R. 23). Moreover, none of the busses went near the front of the tavern (R. 2) because it is situated on a one-way street going west over which no busses travel, while the petitioner's busses travel east. It was around 6:40 when the officers questioned the petitioner (R. 24). The next bus was not due for nearly an hour, but since the petitioner didn't know what time the bus was due (R. 23)*, he obviously didn't intend to catch a bus.

These facts are strong evidence that the petitioner was in fact loitering or loafing in a public place along a public thoroughfare, and the officers were justified in making this arrest on the basis of the first part of the loitering ordinance alone. *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 135.

But notwithstanding this, the petitioner was simultaneously violating another part of the *same* loitering ordinance in that he was trespassing and loafing in a tavern, without *first* having obtained the express consent of the owner or controller.

Section 244.080(3) of the Kentucky Revised Statutes (App. A, p. 28) forbids the sale of alcoholic beverages to anyone convicted of drunkenness three or

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*"Mr. Lusky: The record will show I was the one that said 7:30.

Mr. Dougherty: He said 7:15.

The Witness: Well, I didn't have a watch on and I didn't know the time.

Q. You didn't know what time the bus was due?

A. Yes."

more times within the past twelve months. § 244.120(1) (App. A, p. 28) forbids alcoholic beverage licenses to permit "people of ill repute to congregate on the premises." § 61-46 of the Louisville General Ordinances (App. A, p. 23) forbids dancing in any place where alcoholic beverages are sold (excepting hotels).

At the time the petitioner entered the saloon, he had been convicted of being drunk in a public place eight times within the year preceding January 24, 1959 (App. B, p. 29). From a legal standpoint, his presence was an anathema to any person licensed to sell alcoholic beverages. It would have been a violation of the alcoholic beverage laws to sell the petitioner a drink, and the manager in fact testified that he had sold him nothing (R. 26), nor had he seen him eat anything (R. 28). Thus the petitioner's actions clearly indicated a trespass *ab initio*. *Barrett* v. *Lightfoot* (1824), 17 Ky. (1 T. B. Monroe) *241, 15 Am. Dec. 110; cf. *Markham* v. *Brown* (1837), 8 N. H. 523, 31 Am. Dec. 209. He abused his original entry by wrongful actions which placed a valuable right of the owner in jeopardy, and this without even purchasing anything there (R. 2, 25, 26). This was a trespass.

The petitioner argues that the absent owner (R. 29) impliedly consented to his presence. It has already been shown (p. 7) that implied consent is not a sufficient defense to a violation of the loitering ordinance as construed by the court. But even if implied consent were sufficient, the petitioner did not have it. The rule of implication works both ways, and little demonstration is necessary to show that the owner did not im-

pliedly consent to the presence of one who placed his city and state alcoholic beverage licenses in jeopardy on three separate counts.

The owner of the tavern consented to the entry of the general public only for the purpose of making purchases. This was a business—not a place for dancing auditions. The petitioner had been in the tavern for over a half hour, had purchased nothing—except by his own testimony, and was dancing when the officers entered. He had not *first* obtained the consent of the controller to do these things without buying something, and the controller in fact testified that he didn't want the petitioner to dance there (R. 27). It is obvious that the petitioner was violating either of two parts of the loitering ordinance and the police were authorized to make the arrest.

The foregoing evidence having established that the petitioner was loitering within the meaning of the ordinance, the further consideration arises whether at the time of his arrest petitioner:

(1) Had *visible* means of support, or, alternatively,

(2) Was unable to give a *satisfactory* account of himself.

Many who have seen the petitioner agree that he has no *visible* means of support. He testified that he works only one day a week (R. 17), and he *appears* to have no financial responsibility whatever. Unlike the vagrancy statute, the loitering ordinance does not make proof of means of support a defense to a charge of loitering.

The fact that a person has no *visible* means of support is an element of loitering. [It was this distinction which the prosecutor had in mind when he emphasized that this was a charge of loitering—not vagrancy (R. 16).]

Alternatively, at the time of his arrest the petitioner was unable to give a satisfactory account of himself. Certainly the arresting officer, Mr. Lacefield, so believed and apparently the police judge likewise so believed. That this is a reasonable attitude on the part of both the arresting officer and the police judge in the light of the evidence can easily be established if the Court would place themselves in the position of the arresting officer at the time and place of the arrest. Consider these facts which confronted Mr. Lacefield *at the time of the arrest*:

The police officers entered a tavern on a routine check as specified by local ordinance as a condition to enforcing propriety and order on premises licensed to sell liquor. That same ordinance of the City forbids dancing on any licensed premises other than hotels. This tavern was not of such a nature. When the police officers entered these premises, which are open to the public for the purpose of selling food and alcoholic beverages to the public, and for no other purpose, they found the petitioner dancing by himself in the middle of the floor, neither eating nor drinking. When queried by the arresting officer as to what he was doing on these premises, he did not answer that he was waiting to be served food or drink, or any other reason associated with the business purpose of the

premises but said that he was waiting for a bus! These premises face upon a one-way street going west, whereas any bus which the petitioner would catch to return to his home would be going east on a one-way street approximately one block from the entrance to the tavern.

Certainly no reasonable man can say that the petitioner gave a satisfactory account of himself.

As to the disorderly conduct charge (App. A, p. 25), the petitioner contends that a person must always argue back and forth with the arresting officer (Pet. Brief, p. 19), otherwise, this will be a waiver of his right to question the validtiy of the arrest. Two cases are cited (Pet. Brief, pp. 19-20): *Nickell* v. *Commonwealth* (1955), Ky., 285 S. W. 2d 495, and *Sternberg* v. *Hogg* (1934), 254 Ky. 761, 72 S. W. 2d 421. In the *Sternberg* case, *supra,* the question was whether or not the arresting officer informed the accused of his intention to arrest him. In the *Nickell* case, *supra,* the Court said at 285 S. W. 2d 496:

> "The provision [§ 39 of the Criminal Code] has always been construed as requiring only a substantial compliance, and notwithstanding the absence of qualification, as not requiring its observance where it is impractical or futile, as where the person about to be arrested knows of the officer's intention or purpose or when he resists arrest or when the officer has no reasonable opportunity to inform him."

The police informed the petitioner of their intention to arrest him and the nature of the charge (R. 2, 25). Arguing back and forth (R. 3) was uncalled for. The evidence plainly supports the disorderly conduct charge.

Moreover, the highest court of Kentucky has held that "it has long been the rule that a peace officer who arrests one for being . . . disorderly in his presence is not liable in an action for false arrest and imprisonment if . . . he had reasonable grounds to believe and did believe in good faith, that the person arrested was . . . disorderly in his presence." *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 136.

There was evidence to support the offenses charged. Granted that there was also conflicting evidence, no Constitutional restriction prevents a judge from resolving such conflicts favorably to the Commonwealth.

This Court has reiterated that while it will examine the record of a state court in criminal cases involving a claimed denial of Constitutional rights, it will not overrule the state court on the propriety of admitting evidence "shocking to the sensibilities," as a denial of due process, *Lisenba* v. *California* (1941), 314 U. S. 219, 228, nor will the Court overrule a state court on fairly debatable factual issues. *Hoag* v. *New Jersey* (1958), 356 U. S. 464, 471. Respect for the conclusion of the state judiciary compels the acceptance of the conclusion of the trier on disputed issues unless it is so *lacking* in support as to violate due process. *Akins* v. *Texas* (1945), 325 U. S. 398, 402. It

cannot be denied that the facts in this case, both for and against conviction, are "fairly debatable."

II. Due Process of Law Does Not Require Appellate Review of Convictions for Petty Misdemeanors.

It requires little citation of authority to assert that "due process of law does not require a State to afford review of criminal judgments." *Griffin* v. *Illinois* (1956), 351 U. S. 12, 21.

> "A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow such a review. A citation of authorities upon the point is unnecessary." *McKane* v. *Durston* (1894), 153 U. S. 684, 687; *Andrews* v. *Swartz* (1895), 156 U. S. 272, 275; *Murphy* v. *Massachusetts* (1900), 177 U. S. 155, 158.

It has long been recognized that the right to appellate review is a matter of legislative grace. *United States* v. *More* (1805), 7 U. S. (3 Cranch) 159, 171, 173; *Cobbledick* v. *United States* (1940), 309 U. S. 323, 325.

But notwithstanding, Kentucky *does* grant an appeal as a matter of right in all cases before the Louisville Police Court where a fine of twenty dollars or more, or imprisonment of more than ten days, is imposed. § 26.080 (1) and (3), Kentucky Revised Statutes (App. A, p. 27). This is certainly a reason-

able line of demarcation. Chaos would result from allowing a review of every infinitesimal penalty imposed by the police court. The court handles more than 25,000 cases each year. One can barely visualize the appellate dockets with more than 25,000 cases added to the multitude of original actions which are filed direct in those higher courts. The utopian system necessary to handle so many additional appeals would entail prodigious expense. To attempt the handling of such an increase under the present system would indeed result in a "leaden footed" judicial administration.

It is further suggested that a jury trial should be made available in cases involving fines of less than one hundred dollars, or fifty days' imprisonment (Pet. Brief, pp. 39-41). While this proposal also is ideal, it too ignores realities.

Summary trials for petty offenses are indigenous to the common law and their Constitutionality has been consistently upheld:

> "In the fact of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the Constitutional guaranty of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right. . . ." *District of Columbia* v. *Clawans* (1937), 300 U. S. 617, 627.

The reasons for the existence of summary trials for petty offenses still include those put forth by Blackstone, 4 Blackstone, Commentaries *280:

> ". . . for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense."

Speedy justice in such cases is advantageous not only to the defendant, but to the city and state as well. The jails would be packed with individuals charged with minor offenses, unable to make bail, boarding at public expense while awaiting a trial. Moreover, the burden to the citizen who must serve as a juror at these frequent hearings would be unbearable. Civic duty constitutes only one of the myriad demands for a prospective juror's limited time.

Unfortunately, theoretical ideals do conflict with practical realities. Providing appellate reviews and jury trials for every petty offense is just such an instance. It therefore becomes simply a matter of expediency. Of course, expediency should not be permitted to result in great injustice, but in the case of a petty offense with a small punishment, the injustice is not great. It may exist, but the defendant can not be greatly injured. "Upon this point a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner* (1921), 256 U. S. 345, 349.

III. It Can Not Be Asserted That Kentucky Affords No Redress for Alleged Injuries Arising Out of Non-Appealable Convictions Until the Highest Court of the State Has Been Given the Opportunity to Pass Directly on the Question.

We believe it manifestly incorrect to argue the existence or non-existence of a civil or criminal remedy to vindicate alleged injustices arising out of non-appealable fines. This question was never submitted to the court below, nor has the highest court of Kentucky been afforded the opportunity to study the situation by a consideration of briefs and arguments. This case was never before the Kentucky Court of Appeals. The only question which the court considered was the propriety of the Circuit Court's staying the judgment of the Louisville Police Court by a writ of habeas corpus. Because no basis in Kentucky decision law exists for the petitioner's premise, it should be ignored. The Kentucky Court of Appeals has previously stated:

> "The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person. Sec. 14. And we have already recognized that the writ of coram nobis is a part of our 'due course of law.'" *Anderson* v. *Buchanan* (1943), 292 Ky. 810, 168 S. W. 2d 48, 52.

Section 110 of the Kentucky Constitution (App. A, p. 28) provides:

> "The Court of Appeals . . . shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

The Kentucky Court of Appeals has held that small fines alone do not constitute irreparable injury. *Thompson* v. *Wood* (1955), Ky., 277 S. W. 2d 472, 474; *Walters* v. *Fowler* (1955), Ky., 280 S. W. 2d 523, 524. However, the court implied that if a great and irreparable injury would be done, the Court of Appeals would assume jurisdiction under § 110 of the Kentucky Constitution. *Thompson* v. *Wood, supra,* at 474. Where, as here, there is financial inability to pay, as well as the other circumstances alleged, creating such a great and irreparable injury, the Court of Appeals probably would take jurisdiction. Certainly that court never has been confronted with this situation, and should be given an opportunity to consider whether petitioner is suffering a great and irreparable injury.

IV. Frequent Convictions Do Not Transform Arrests Into Reprisals.

An attempt was made to establish whether or not the police were familiar with the past record of the petitioner (R. 11). The purpose now appears to be the establishment of a premise (Pet. Brief, p. 57) that any subsequent arrests are "reprisals." Non sequitur.

Whether or not the police knew of the petitioner's record is immaterial so long as the elements of an offense exists to justify the arrest.

But it should be emphasized that past experience is, for the law enforcement officer, an indispensable aid for evaluating the actions of certain individuals who are frequent violaters. Loitering, vagrancy, and "suspicious persons" laws are somewhat anomalous categories. They are not susceptible to the same tangible modes of proof that disclose most offenses.

The purpose of such laws, particularly in municipal areas, is obvious. Yet they would play a worthless role in preserving the safety and welfare if police officers must turn their heads to await only the most pronounced evidence, for such proof is not common to these offenses. Of course, the power to arrest on such grounds should be used with great care.

But one characteristic common to such offenses is that they arise more from a course of conduct or a manner of life than from an isolated act. Granted that any person can make himself appear exceedingly suspicious or idle at a given time, yet the vast majority of such cases involve recidivists. While such experience is not a license to arrest past offenders, it can hardly be discounted by a conscientious policeman. Many major crimes have been nipped in the bud by such vigilance.

There is no meritorious basis for petitioner's claim of reprisals. This argument should be summarily dismissed.

CONCLUSION.

For the reasons stated it is respectfully submitted that both of the judgments of the Louisville Police Court, entered February 3, 1959, should be affirmed.

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October, 1959.

APPENDIX A.

ORDINANCES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED.

I. General Ordinances of the City of Louisville.

§ 61-25. *Conditions.* All licenses granted under this ordinance shall be granted subject to the following conditions, and all other conditions of other ordinances and regulations of the City of Louisville applicable thereto and all rules and regulations duly adopted by the City Alcoholic Beverage Administrator:

(a) Every applicant procuring such license thereby consents to the entry of police or any duly authorized representative of the police department of the City of Louisville including the City Alcoholic Beverage Administrator, or any of his employees, or those of the Department of Health, at all reasonable hours for the purpose of inspection and search and consents to the removal from said premises of all things and articles which are had in violation of said ordinance of the City of Louisville or State Law or Federal Law and consents to the introduction of such things and articles in evidence in any hearing or prosecution that may be brought for such offense.

§ 61-46. *Dancing on Premises Prohibited.* No license to dispense alcoholic beverages shall be granted to any applicant, except a hotel, who sells, gives away or dispenses or is equipped to sell, give away or dispense alcoholic beverages from a bar in any room where the patrons of the place of business, owned, operated or conducted by the applicant are invited or permitted to dance; nor to any applicant except a hotel who maintains a bar in any room where the patrons of the place of business owned, operated

or conducted by the applicant are invited or permitted to dance.

§ 61-55. *General Penalty.* Any person who shall violate any provision of this ordinance for which no specific penalty is provided shall be fined not less than Ten Dollars ($10.00) nor more than One Hundred Dollars ($100.00) for each such offense. Such fine, in the case of a licensee violating any provision of this ordinance, shall be in addition to and independent of any action which may be taken by the City Alcoholic Beverage Administrator.

§ 67-15. *Amusement.* Every person or corporation engaged in the business as said term is defined under Section 67-4 of this ordinance of upholding, sponsoring or exhibiting any concert, lecture, exhibition, museum, show or performance of any kind whatsoever not held in a regularly licensed theater, amusement park, or the Louisville War Memorial Auditorium, shall pay a license fee of $100.00 for each week or fraction thereof, such fee to be paid prior to said exhibition or performance. This section shall not include a dance hall.

§ 67-16. *Dance Halls.* Each dance hall in the City of Louisville shall pay a minimum license fee of $62.00 annually on or before July 15 of each year. Any place of business held open to the general public where patrons are permitted to dance shall be deemed a dance hall within the meaning of this section. Provided, however, that a regularly licensed place of amusement shall not be deemed a dance hall within the meaning of this section.

Before a license shall be issued to a dance hall as defined hereunder, the licensee shall first obtain the written approval of the Director of Safety of the City of Louisville.

§ 67-39. *Violation As Misdemeanor.* Any person or corporation who shall fail, neglect or refuse to make any return required by this ordinance, or any employer who

shall fail to withhold said license fees or to pay over to the City fees so withheld under the terms of this ordinance, or any person who shall refuse to permit the Secretary-Treasurer or any agent or employee designated by him, in writing, to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits in order to avoid the payment of the whole or any part of the license fee shall, upon conviction, be subject to a fine or penalty of $100.00 and costs for each offense.

§ 85-8. *Disorderly Conduct, Penalty.* (a) Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), or imprisoned not exceeding fifty (50) days, or both so fined and imprisoned.

(b) In addition to imposing a fine, the Police Court may hold the offender to bail in a sum not exceeding one thousand dollars ($1,000) to keep the peace, or be of good behavior for any length of time not exceeding one year.

(c) Should the offender fail to give bond or fail to pay the fine, he shall be forthwith committed to the city workhouse, and shall be kept in custody until bail be given, or until the time fixed by the judgment all have expired and the fine be paid or satisfied by labor as provided by law.

§ 85-12. *Loitering, Prohibited.* It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville; or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louis-

ville, without first having obtained the consent of the owner or controller of said premises, structure, or building; or for such person or persons to sleep or lie in or upon any public thoroughfare, highway, park, boulevard, or wharf of the City of Louisville; or for such person or persons to beg or solicit alms in the streets or the highways of the City of Louisville; or for such person or persons to habitually consort with bawds, thieves, malefactors, or other disreputable or dangerous characters in the City of Louisville.

§ 85-13. *Penalty.* Any person violating this ordinance shall be guilty of the offense of loitering, and shall be liable to arrest therefor; and for each offense shall be punished by a fine of not exceeding fifty dollars ($50.00), or he shall be compelled to give bond in the sum of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), conditioned upon his or her good behavior, and keeping the peace for not exceeding one year; and in default of such bond, if the same be required, the defendant shall be imprisoned in the workhouse, and there confined during the period said bond was to cover, or until the same shall be executed as required; or the defendant may be both so fined and required to execute a bond to be of good behavior as aforesaid, in the discretion of the court.

II. Kentucky Revised Statutes.

§ 26.010 *Criminal and penal jurisdiction of police courts.* Except as provided in KRS 167.990, 199.990 and 242.990, police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and

exclusive jurisdiction of all violations of city ordinances, occurring within the city limits.

§ 26.080 *Appeals to circuit court and Court of Appeals from police court in cities of first class.* (1) In cases where a fine of twenty dollars or more is imposed by the police court in a city of the first class, appeal may be taken to the circuit court.

(2) In cases where a fine of twenty dollars or less is imposed under an ordinance of a city of the first class, the legality of the ordinance may be tested by the city by an appeal to the circuit court, or by the defendant by a writ of prohibition to the circuit court, and after a decision has been rendered in the circuit court either the city or the accused may appeal from the circuit court to the Court of Appeals.

(3) In all cases where, in addition to a fine, imprisonment exceeding ten days is imposed by the police court in a city of the first class, the defendant may appeal to the circuit court, and thence to the Court of Appeals, except in cases in which bail has been required for good behavior and has not been given.

§ 95.150 *Police, powers and duties.* (1) The chief and members of the police force shall possess all the common law and statutory powers of constables, except for the service of civil process.

§ 244.080 *Retail sales to certain persons prohibited.* No retail licensee shall sell, give away or deliver any alcoholic beverages, or procure or permit any alcoholic beverages to be sold, given away or delivered to:

(1) . . .

(2) . . .

(3) An habitual drunkard or any person convicted of drunkenness as many as three times within the most recent twelve months period.

§ 244.120 *Retail premises not to be disorderly.* (1) No person licensed to sell alcoholic beverages at retail shall cause, suffer, or permit the licensed premises to be disorderly or allow criminals and people of ill repute to congregate on the premises.

III. Kentucky Constitution.

§ 110. *Jurisdiction and Powers of Court of Appeals.*— The court of appeals shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions.

IV.. Kentucky Criminal Code.

§ 36 *Peace officer may arrest; when.* A peace officer may make an arrest—

1. *In obedience to warrant.* In obedience to a warrant of arrest delivered to him.

2. *Without a warrant; when.* Without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested his committed a felony.

3. *Officer may go out of county to arrest; when.* That such peace officer with a warrant of arrest may cross a county line and proceed as far as two miles therefrom for the purpose of making the arrest in the adjoining county or counties; provided, that such peace officer, when in the actual pursuit of an offender, may go so far as may be necessary for the purpose of making such arrest.

APPENDIX B.

POLICE RECORD OF SAM THOMPSON.

From January 24, 1958 to January 24, 1959.

6- 7-58 DPP—Am. D.C. $5.00
6-12-58 DPP—$10.00 fine
6-25-58 DPP, DC—$10.00 fine on DPP, D.C. Filed Away
7- 4-58 DPP—$10.00 fine
7-12-58 Vag-Loit—Vag $20.00 fine; Loit. Filed Away
8-30-58 DPP—$20.00 fine
9-27-58 DPP—$10.00 fine
10-24-58 DPP—$10.00 fine
11-16-58 DPP-Loit—DPP $10.00 fine; Loit Filed Away
1-10-59 DPP, DC—DPP $10.00 fine; D.C. Filed Away
1-14-59 Vag, Loit—Vag. 30 days; Loit $20.00
Appealed Criminal Court—Dismissed 3-18-59
1-24-59 Loit, DC—Loit $10; DC $10

/s/ James E. Malone, Major
Superintendent,
Bureau of Records

EXPLANATION:

DC—Disorderly Conduct.
DPP—Drunk in a Public Place.
Loit—Loitering.
Vag—Vagrancy.

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Supreme Court, U.S.
FILED
JAN 9 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

PETITIONER'S REPLY BRIEF.

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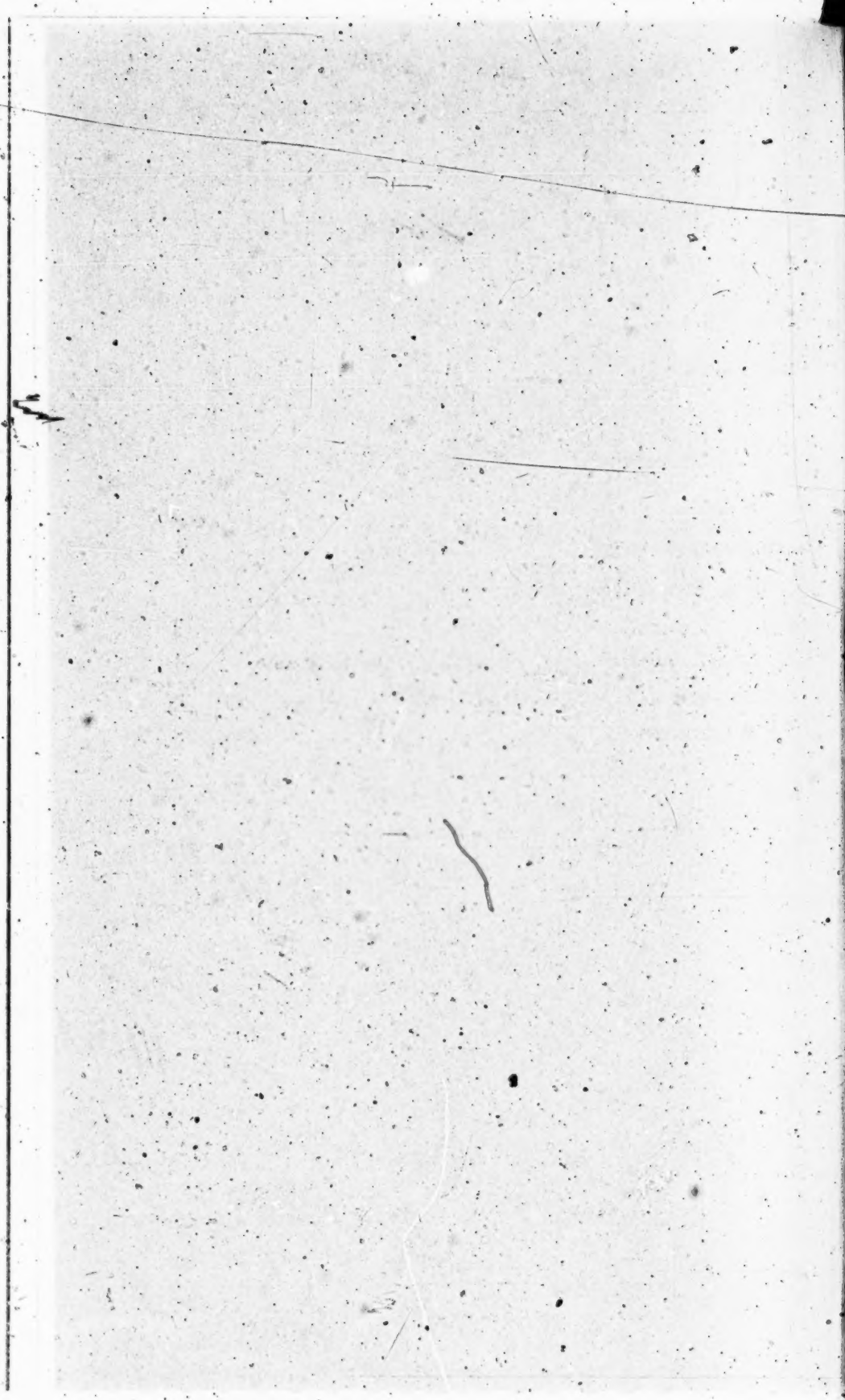

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IN THE

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October Term, 1959.

No. 59

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

PETITIONER'S REPLY BRIEF.

May it please the Court:

Though respondents' brief raises no substantial issue which has not been dealt with in our main brief, it does afford further insight into the curious conception of criminal justice which is entertained by the City of Louisville and is administered through its Police Court. The respondents have succeeded in dispelling any doubt that the state of affairs reflected by the present record results from a deliberate official policy, systematically applied, rather than from an unfortunate aberration.

The substance of this policy is avowed with remarkable frankness. Respondents say that in loitering cases guilt or innocence cannot be determined by "the

same tangible modes of proof that disclose most offenses", since "they arise more from a course of conduct or a manner of life than from an isolated act" (Brief, p. 21). Or, to say the same thing more bluntly, the question is not what petitioner has *done* but what kind of man the police think he *is*. This is said to be a salutary approach because, respondents declare, "Many major crimes have been nipped in the bud by such vigilance". (*Ibid.*)

Nor, apparently, do respondents even consider it necessary to adduce evidence on these shadowy issues. The present record contains no proof of petitioner's "course of conduct" or "manner of life," and indeed rebuts the implication that his arrest may have forestalled a "major crime"; he had no felony record (R. 37-38). Beyond this, there is no showing that either of the arresting officers knew anything about the petitioner's "manner of life"; officer Barnett (who did not testify) was only proved to have known of the bus station incident which took place ten days before (R. 26), and officer Lacefield testified that he did not even know about that (R. 11). But respondents nevertheless claim that the arrests and convictions were lawful.

The plain purport of respondents' argument is that crime can effectively be suppressed by the erection of a conclusive presumption to the effect that anyone who is arrested for loitering must be guilty. (Why else would he have been arrested?) And if injustice is the by-product of this great public service, respondents say (with the full concurrence of Kentucky's highest

court) that "in the case of a petty offense with a small punishment, the injustice is not great" (Brief. p. 18). In Point III of our main brief, we have said why we cannot agree that justice is measurable in dollars.

The cold determination with which the City pursues its said policy is shown by its readiness to indulge in fanciful departures from the record and to embrace weirdly novel interpretations of ordinances and statutes. We simply note here the more extreme instances, foregoing extended discussion:

1. *Misstatements of the evidence.* The following factual assertions, which are contrary to the undisputed evidence, appear in respondents' brief:

(a) That petitioner had had nothing to eat or drink at Liberty End Cafe (Resp. Brief, pp. 9, 12). The evidence on this point is not in conflict. It is fully and fairly reviewed in our main brief (pp. 17, 21). There is no reason why, having finished his macaroni and beer, he could not stay in the cafe to wait for his bus, as he told officer Lacefield he was doing.

(b) That petitioner "could not—or would not—even say whether a man or a woman made the sale" (Resp. Brief, p. 9). He was not asked this question.

(c) That petitioner "confided at the trial that he didn't know what time the bus was due" (Resp. Brief, p. 10). He did not do so. The truncated excerpt from the testimony which respondents quote in their supporting footnote is immediately

followed by petitioner's explanation (not quoted) that though he had no watch he could tell the time from the cafe clock (R. 23-24).

(d) That petitioner was questioned at "around 6:40" (Resp. Brief, p. 10). The record does not show when the questioning took place. Officer Lacefield testified that he made the arrest at 6:53 P.M. (R. 1). Only the briefest questioning preceded the arrest (R. 2).

(e) That the police "informed he petitioner of their intention to arrest him and the nature of the charge" (Resp. Brief, p. 15). The undisputed evidence is that they arrested him first and informed him later (R. 2, 24).

(f) That petitioner at the time of his arrest was "unruly" (Resp. Brief, p. 4). The undisputed evidence is to the contrary (R. 24-25; *cf.* R. 3).

2. ***Factual assertions unsupported by the evidence.*** On the specious ground that petitioner's alleged prior drunkenness convictions are pertinent to the present loitering charge, respondents have printed as Appendix B to their brief what purports to be an unauthenticated list of a number of misdemeanor arrests including but not limited to drunkenness. The list is apparently compiled from police department records, which are not public records and were not received in evidence. They were offered at the January 20 trial but were excluded when cross-examination disclosed confusion

between two separate Sam Thompsons. They were not offered in evidence at the February 3 trial.*

Respondents also imply that petitioner is a person of "ill repute" (Brief, p. 11). The record does not so indicate.

3. *Grotesque statutory construction.* The facts, even as remade by respondents, do not support their legal position unless they can win this Court's acquiescence in the following bizarre contentions—none of which, so far as we can ascertain, has ever been approved by the Police Court of Louisville *or any other Kentucky court:*

> (a) That the prohibition against loitering "upon, along, in or through the public streets" includes loitering in privately owned premises adjacent to public streets (Brief, pp. 2, 3, 6, 7).

This would of course include every store and dwelling in town and would render superfluous the next clause (analyzed and discussed at pp. 14-18 of our main brief) which does apply to private premises. In a gallant effort to avoid this absurdity, respondents make from whole cloth the further contention that "along * * * the streets" includes only those private premises which are also "public places" within the meaning of the prohibition against drunkenness in a

*In view of respondents' eagerness to bring this material before the Court, it is perhaps appropriate to note that petitioner has been arrested twelve times since January 24, 1959, and is now in Jefferson County Jail by reason of his inability to make a $500 peace bond. The judgment requiring the peace bond is unappealable. KRS § 26.080(3).

public place. That is the only apparent pertinence of the *Ginger (sic. Ginter)* citation.

(b) That "visible means of support" is affluence so apparent that police officers can detect its absence even if, like the arresting officers here, they ask no questions about it (Brief, p. 12).

The requirement might be satisfied by the wearing of a sandwich sign carrying a current personal balance sheet and operating statement, duly certified. It is hard to see how anything less would serve.

The prosecutor will perhaps be astonished at respondents' assertion (Brief, p. 13) that he emphasized at the trial the distinction between the loitering ordinance (which uses the word "visible") and the vagrancy statute (which does not). What he *said* was: "There is no charge of no visible means of support" (R. 16).

(c) That the requirement of a "satisfactory account" is not satisfied even by a complete, truthful and polite response to a police interrogation unwarranted by law, if the policeman (not knowing that suburban buses run on schedules and relying on what he understood Mr. Marks to have told him) "reasonably" doubts its veracity (Brief, pp. 13-14).

This point is discussed at pp. 15-17 of our main brief.

(d) That it is a crime to "dance" (here, to shuffle one's feet to the music of a juke-box) in any tavern or other place licensed to sell beer at a bar, except a hotel (Brief, pp. 3, 13).

The ordinances cited for this view (Resp. Brief, Appendix B, pp. 23-25) prescribe limitations on the grant of alcoholic beverage licenses and dance hall licenses but do not purport to regulate or penalize dancing as such. City licenses to dispense alcoholic beverages are not to be granted to any applicant (other than a hotel) who invites or permits dancing in a room where the bar is located (§ 61-46). Separate dance hall licenses are to be issued only if the City Director of Safety approves (§ 67-16). The Director of Safety is not empowered, however, to grant dispensations from § 61-46. Officer Ellis and his superiors may be interested to learn this, since his testimony indicates that the police have been approving dance hall licenses for some beer licensees (R. 13). Judge Taustine may also be interested to know that his gratuitous inquiry as to the existence of a "license for dancing" (R. 9) was wholly foreign to the issues, since the Liberty End Cafe has but one room for its customers and could therefore not operate as a dance hall without losing its beer license.

It is pretty far-fetched to say that petitioner's little "dance" converted the cafe into a dance hall or jeopardized its beer license. But it is downright ridiculous to suggest that his foot-shuffling rendered him a criminal or a trespasser (Resp. Brief, pp. 11, 13). The

cited city alcoholic beverage ordinance, like KRS § 244.080 (referred to below) prescribes requirements for licensees and not for their customers.

(e) That KRS § 244.080, which forbids licensees to sell alcoholic beverages to certain classes of people, made it illegal for petitioner to buy a glass of beer.

There are two answers to this. First, the record contains no evidence that petitioner came within any of the specified classes—minors, intoxicated persons, habitual drunkards, persons convicted of drunkenness three times in the past year, etc.; nor is there any evidence that he was a person of ill repute, or disorderly (see KRS § 244.120).

Second, Attorney General Jo M. Ferguson, of counsel for the respondents, has officially ruled (Op. Atty. Gen. No. 38,568, June 14, 1956), that "only the licensee may be charged with and convicted of a violation of said statute [KRS § 244.080]", so that even a bartender employed by the licensee cannot be prosecuted under it—much less a customer. Nor was petitioner charged with such a violation.

(f) That the privileges of the police to inspect premises licensed for the dispensing of alcoholic beverages includes the right to interrogate the customers of such licensees and require them to give a "satisfactory account" of themselves (Resp. Brief, p. 13).

The ordinance (§ 61-25) does not say so.

> (g) That a landlord's general invitation to the public, which is of course sufficient to bar an action for civil trespass, is not sufficiently "express" to satisfy the loitering ordinance (Resp. Brief, p. 11).

This has the anomalous effect of giving criminal trespass a broader scope than civil trespass.

Respondents are of course mistaken in saying that the Police Court has adopted any of the foregoing positions as to the meaning of the ordinances and statutes. All Judge Taustine said was: "Let the judgment be a $10 fine on each charge" (R. 31).

4. *Misstatement of the issues.* Respondents devote a good deal of their brief to issues which we have not raised, such as the questions whether plenary appellate review is a due process requirement (Brief, pp. 2, 16-18) and whether reprisal can be inferred from the sole fact of repeated convictions (*Id.*, pp. 3, 20-21).

Respondents also seek to make it appear that petitioner might have obtained relief in the Kentucky Court of Appeals because of his "financial inability to pay" the two $10 fines (Brief, p. 20). It is true that petitioner is not a rich man. His resources might well have been insufficient to defray the expenses of this appellate proceeding, and it is for that reason that Kentucky Civil Liberties Union (the Kentucky affiliate of American Civil Liberties Union) has assumed the burden of that expense in consideration of the im-

portant issues involved—for which generosity petitioner and his counsel are duly grateful. But petitioner has never contended that he was financially unable to pay the two $10 fines; and in our petition for certiorari (footnote, p. 36) we explicitly pointed out that the Court of Appeals had been mistaken in assuming otherwise.

Moreover, the very fact that the Court of Appeals withheld relief on the merits in spite of its erroneous assumption that petitioner was financially unable to pay the fines, shows that respondents are mistaken in asserting that this circumstance might have carried weight. The Court of Appeals had before it the entire record which is available to this Court—including the transcripts of evidence taken at the two trials. It demonstrated its readiness to grant relief under § 110 even though a different form of relief had been requested; but it nevertheless declared that petitioner's substantive Federal claims "cannot be tested" except on certiorari to this Court. Respondents' counsel, far from urging in the Court of Appeals that a State Court remedy was available, vigorously urged the opposite view (see Reply Brief in Support of Certiorari Petition, pp. 2-3). It is hardly consistent for them to contend now that review under § 110 was available.

Finally, the respondents' brief repeatedly argues that the *arrest* was legal even if the conviction was erroneous (pp. 5, 13, 15). This case brings up the convictions themselves for direct review, and the respondents' concern over the legality of the arrest as such simply emphasizes their determination to preserve the

immunity of police officers from civil liability for their official actions, however arbitrary those actions may be.

The year is now 1960. It is not 1600; nor, if we may be permitted to say so, is it 1984.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1959.

Sam Thompson, Petitioner, v. City of Louisville, et al. } On Writ of Certiorari to the Police Court of the City of Louisville, Kentucky.

[March 21, 1960.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was found guilty in the Police Court of Louisville, Kentucky, of two offenses—loitering and disorderly conduct. The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

The facts as shown by the record are short and simple. Petitioner, a long-time resident of the Louisville area, went into the Liberty End Cafe about 6:20 on a Saturday evening, January 24, 1959. In addition to selling food, the cafe was licensed to sell beer to the public and some 12 to 30 patrons were present during the time petitioner was there. When petitioner had been in the cafe about half an hour, two Louisville police officers came in on a "routine check." Upon seeing petitioner "out there on the floor dancing by himself," one of the officers, according to his testimony, went up to the manager who was sitting on a stool nearby and asked him how long petitioner had been in there and if he had bought anything. The officer testified that upon being told by the manager that petitioner had been there "a little over a half-hour and that he had not bought anything," he

accosted Thompson and "asked him what was his reason for being in there and he said he was waiting on a bus." The officer then informed petitioner that he was under arrest and took him outside. This was the arrest for loitering. After going outside, the officer testified, petitioner "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him." Admittedly the disorderly conduct conviction rests solely on this one sentence description of petitioner's conduct after he left the cafe.

The foregoing evidence includes all that the city offered against him, except a record purportedly showing a total of 54 previous arrests of petitioner. Before putting on his defense, petitioner moved for a dismissal of the charges against him on the ground that a judgment of conviction on this record would deprive him of property and liberty without due process of law under the Fourteenth Amendment in that (1) there was no evidence to support findings of guilt and (2) the two arrests and prosecutions were reprisals against him because petitioner had employed counsel and demanded a judicial hearing to defend himself against prior and allegedly baseless charges by the police.[2] This motion was denied.

Petitioner then put in evidence on his own behalf, none of which in any way strengthened the city's case. He testified that he bought, and one of the cafe employees

[1] Upon conviction and sentence under §§ 85-8, 85-12 and 85-1 of the ordinances of the City of Louisville, petitioner would be subject to imprisonment, fine or confinement in the workhouse upon default of payment of a fine.

[2] Petitioner added that the effect of convictions here would be to deny him redress for the prior alleged arbitrary and unlawful arrests. This was based on the fact that, under Kentucky law, conviction bars suits for malicious prosecution and even for false imprisonment. Thus, petitioner says, he is subject to arbitrary and continued arrests neither reviewable by regular appellate procedure nor subject to challenge in independent civil actions.

served him, a dish of macaroni and a glass of beer and that he remained in the cafe waiting for a bus to go home.[1] Further evidence showed without dispute that at the time of his arrest petitioner gave the officers his home address; that he had money with him, and a bus schedule showing that a bus to his home would stop within half a block of the cafe at about 7:30; that he owned two unimproved lots of land; that in addition to work he had done for others, he had regularly worked one day or more a week for the same family for 30 years; that he paid no rent in the home where he lived and that his meager income was sufficient to meet his needs. The cafe manager testified that petitioner had frequently patronized the cafe, and that he had never told petitioner that he was unwelcome there. The manager further testified that on this very occasion he saw petitioner "standing there in the middle of the floor and patting his foot," and that he did not at any time during petitioner's stay there object to anything he was doing. There is no evidence that anyone else in the cafe objected to petitioner's shuffling his feet in rhythm with the music of the juke box or that his conduct was boisterous or offensive to anyone present. At the close of his evidence, petitioner repeated his motion for dismissal of the charges on the ground that a conviction on the foregoing evidence would deprive him of liberty and property without due process under the Fourteenth Amendment. The court denied the motion, con-

---

[1] The officer's previous testimony that petitioner had bought no food or drink is seriously undermined, if not contradicted, by the manager's testimony at trial where the manager stated that the officer "asked me *I had* [*sic*] sold him any thing to eat and I said no and he said any beer and I said no . . . ." (Emphasis supplied.) And the manager acknowledged that petitioner might have bought something and been served by a waiter or waitress without the manager noticing it. Whether there was a purchase or not, however, is of no significance to the issue here.

victed him of both offenses, and fined him $10 on each charge. A motion for new trial, on the same grounds, also was denied, which exhausted petitioner's remedies in the police court.

Since police court fines of less than $20 on a single charge are not appealable or otherwise reviewable in any other Kentucky court,[4] petitioner asked the police court to stay the judgments so that he might have an opportunity to apply for certiorari to this Court (before his case became moot)[5] to review the due process contentions he raised. The police court suspended judgment for 24 hours during which time petitioner sought a longer stay from the Kentucky Circuit Court. That court, after examining the police court's judgments and transcript, granted a stay concluding that "there appears to be merit" in the contention that "there is no evidence upon which conviction and sentence by the Police Court could be based" and that petitioner's "Federal Constitutional claims are substantial and not frivolous."[6] On appeal by the city, the Kentucky Court of Appeals held that the Circuit Court lacked the power to grant the stay it did but nevertheless went on to take the extraordinary step of granting its own stay, even though petitioner had made

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[4] Ky. Rev. Stat. § 26.080; and see § 26.010. Both the Jefferson Circuit Court and the Kentucky Court of Appeals held that further review either by direct appeal or by collateral proceeding was foreclosed to petitioner. *Thompson* v. *Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported; *Taustine* v. *Thompson*, 322 S. W. 2d 100 (Ky. 1959).

[5] Without a stay and bail pending application for review petitioner would have served out his fines in prison in 10 days at the rate of $2 a day. *Taustine* v. *Thompson*, 322 S. W. 2d 100 (Ky. 1959).

[6] *Thompson* v. *Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported.

no original application to that court for such a stay. Explaining its reason, the Court of Appeals took occasion to agree with the Circuit Court that petitioner's "federal constitutional claims are substantial and not frivolous." [8] The Court of Appeals then went on to say that petitioner

> "appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court." [9]

Our examination of the record presented in the petition for certiorari convinced us that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments. 360 U. S. 916. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356 (San Francisco Police Judges Court judgment imposing a $10 fine, upheld by state appellate court, reversed as in contravention of the Fourteenth Amendment).

The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process.[10] The pertinent portion of the city

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[8] *Hugo Taustine et al.* v. *Sam Thompson et al.*, 322 S. W. 2d 100 (Ky. 1959).

[9] *Id.*, at 101.

[10] *Id.*, at 102.

[10] For illustration, the city's brief in this Court states that the questions presented are "(1) Whether the evidence was sufficient to support the convictions, and therefore meets the requirements of the due process clause of the Fourteenth Amendment. . . ."

ordinance under which petitioner was convicted of loitering reads as follows:

> "It shall be unlawful for any person . . . . without visible means of support, or who cannot give a satisfactory account of himself, . . . to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ." § 85-12 Ordinances of the City of Louisville."[11]

In addition to the fact that petitioner proved he had "visible means of support," the prosecutor at trial said "This is a loitering charge here. There is no charge of no visible means of support." Moreover, there is no suggestion that petitioner was sleeping, lying or trespassing in or about this cafe. Accordingly he could only have been convicted for being unable to give a satisfactory account of himself while loitering in the cafe, without the consent of the manager. Under the words of the ordinance itself if the evidence fails to prove all three elements of this loitering charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. The record is entirely lacking in evidence to support any of the charges.

Here, petitioner spent about half an hour on a Saturday evening in January in a public cafe which sold food and beer to the public. When asked to account for his presence there, he said he was waiting for a bus. The city concedes that there is no law making it an offense for a person in such a cafe to "dance," "shuffle" or "pat" his feet in time to music. The undisputed testimony of the manager, who did not know whether petitioner had bought macaroni and beer or not but who did see the patting shuffling or dancing, was that petitioner was welcome

[11] Section 85-13 provides penalties for violation of § 85-12.

there. The manager testified that he did not, at any time during petitioner's stay in the cafe, object to anything petitioner was doing and that he never saw petitioner do anything that would cause any objection. Surely this is implied consent, which the city admitted in oral argument satisfies the ordinance. The arresting officer admitted that there was nothing in any way "vulgar" about what he called petitioner's "ordinary dance," whatever relevance, if any, vulgarity might have to a charge of loitering. There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) without "the consent of the owner or controller" of the cafe.

Petitioner's conviction for disorderly conduct was under § 85-8 of the city ordinance which, without definition, provides that "whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined . . . ." etc. The only evidence of "disorderly conduct" was the single statement of the policeman that after petitioner was arrested and taken out of the cafe he was very argumentative. There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquility of the City of Louisville. The only information the record contains on what the petitioner was "argumentative" about is his statement that he asked the officers "what they arrested me for." We assume, for we are justified in assuming, that merely "arguing" with a policeman is not, because it could not be, "disorderly conduct" as a matter of the substantive law of Kentucky. See *Lanzetta* v. *New Jersey*, 306 U. S. 451. Moreover, Kentucky law itself seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to

complain later that the arrest was unlawful. *Nickell* v. *Commonwealth*, 285 S. W. 2d 495, 496.

Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be sheer denial of due process," [12] so is it a violation of due process to convict and punish a man without evidence of his guilt.[13]

The judgments are reversed and the cause is remanded to the Police Court of the City of Louisville for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[12] *DeJonge* v. *Oregon*, 299 U. S. 353, 362. See also *Cole* v. *Arkansas*, 333 U. S. 196, 201.

[13] See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232. *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103, 106; *Moore* v. *Dempsey*, 261 U. S. 86; *Yick Wo* v. *Hopkins*, 118 U. S. 356. Cf. *Akins* v. *Texas*, 325 U. S. 398, 402; *Tot* v. *United States*, 319 U. S. 463, 473 (concurring opinion); *Mooney* v. *Holohan*, 294 U. S. 103.